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Supreme Court, U.S.
FILED

No. _____

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In The

Supreme Court of the United States

MEGHAN BUSSELL,

Petitioner,

v.

MOTOROLA, INC., a Delaware corporation
and ADECCO EMPLOYMENT SERVICES, INC.,
a Delaware corporation,

Respondents.

On Petition For Writ Of Certiorari
To The Eleventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

There is a split in the circuits (and within the Eleventh Circuit) concerning what evidence constitutes "direct evidence" for purposes of proving discrimination under Title VII of the Civil Rights Act of 1964, and what the proper definition, use, and effect of "direct evidence" is at the summary judgment stage of an employment discrimination case (*e.g.*, whether such evidence requires denial of summary judgment). Should that split be resolved, and did the Eleventh Circuit err by not finding that the following evidence constituted direct evidence of retaliation and/or constructive discharge: Bussell's supervisor (Karge) told her she would not be given a permanent position with increased pay and benefits because she "complained too much" about sexual harassment; Karge made a notation in Bussell's termination documents that she "[r]esigned due to continuing harassment"; a different management official testified that Bussell "was forced out due to continuing harassment"; and Motorola admitted to the EEOC that the harassment Bussell endured violated its anti-harassment policy and issued a separate finding that it did as well?

II.

Should this Court resolve a split in the circuits that has resulted concerning the interpretation of *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006), which held that any activity reasonably likely to dissuade a reasonable employee from engaging in protected activity (complaining of sexual harassment) is

QUESTIONS PRESENTED – Continued

actionable retaliation, in that case, suspension with pay and reassignment to an undesirable position? In this case, the Eleventh Circuit held that constructive discharge, being docked in pay, having a workload increased 3-5 times, being called a "liar" and a "baby" when she would complain about sexual harassment, and the failure to be promoted are all not actionable adverse employment actions for purposes of Title VII's anti-retaliation clause. The Eleventh Circuit has issued previous panel opinions pre-*White* that hold that those adverse employment actions are actionable, and the other circuits have as well. This Court asked the Eleventh Circuit to review its opinion in light of *White*, and the Eleventh Circuit held that *White* does not require the conclusion that any of the alleged adverse employment action is actionable, because *White* is limited to situations in which retaliation occurs beyond or outside of the workplace, and that the adverse employment action was not material enough; however, other circuits have held that *White* lowers the bar as to what adverse action is materially adverse (including the adverse action in this case) and uses an objective standard to judge materiality.

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OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals affirmed the Southern District Court of Florida's Order Granting Defendants' Motions for Summary Judgment, and it is unpublished. The district court's Order Granting Defendants' Motions for Summary Judgment is unpublished. The Eleventh Circuit denied rehearing, which was also unpublished.

This Court granted *certiorari*, vacated the judgment, and reversed the Eleventh Circuit, ordering the Eleventh Circuit to reconsider its decision in light of *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006). The Eleventh Circuit in an unpublished opinion held that the White case does not affect Bussell's case. Upon petition for rehearing and rehearing *en banc*, the Eleventh Circuit declined review.

STATEMENT OF JURISDICTION

The opinion of the Eleventh Circuit Court of Appeals was rendered on December 21, 2006. App. 1a. Rehearing was denied on January 27, 2007. App. 33a. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964 (as amended)

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

42 U.S.C. § 2000e-2(a)(1).

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m).

On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court –

> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 2000e-2(g)(2)(B).

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STATEMENT OF THE CASE

On January 3, 2002, Meghan Bussell, ("Bussell"), a nineteen-year-old female, filed a Complaint in the United States District Court for the Southern District of Florida, bringing three causes of action (sexual harassment, retaliation, and termination/constructive discharge), pursuant to 42 U.S.C. § 2000e *et seq.* (Title VII of the Civil Rights Acts of 1964, as amended) and *Florida Statutes* § 760.01 *et seq.* (the Florida Civil Rights Act of 1992). (R1-1-1).

Following the close of discovery, the Defendants moved for summary judgment as to all claims in May, 2003. (R2-68, 72, 75). Bussell timely responded to the motion (R2-92-116) and the Defendants replied. (R3-120, 122). On August 22, 2003, the Court heard oral argument on the Defendants' Motions. (R4-173). On March 29, 2004, the district court entered an Order Granting Defendants' Motions for Summary Judgment as to all claims, holding that Bussell could not establish that the sexual harassment was sufficiently severe and pervasive to constitute actionable sexual harassment, and could not establish a retaliation claim or constructive discharge claim. (R3-153). Bussell timely appealed the order granting summary judgment, but a three-judge panel affirmed the decision on July 13, 2005.

Bussell was employed by Adecco and assigned to Motorola's Plantation, Florida facility. Motorola and Adecco co-employed Bussell. During all material times, Bussell's Adecco immediate supervisor was Tom Karge and her Motorola immediate supervisor was Laila Pennington. Karge's supervisor was Kathy Brodeur, and Pennington's supervisor was Ana Martinez (Service Center Manager).

Motorola's Human Resources Administrator, who became involved in this case toward the end of it, was Marcy Covington.

Bussell began working for the Defendants in May-June, 2000; Bussell was assigned to the Motorola's IDEN factory, and she worked on the Defendants' assembly line putting together cellular telephones, tuning them, and testing the buttons. (R2-109-25, 30-31). At the time Bussell started work, she was 19 years old. (R2-109-7). In July or August, 2000, Bussell was moved upstairs to Motorola's Inpact Center to work the first shift assembling police radios. (R2-109-35, 45). The primary sexual harasser was Bob Render; Jason Wells was involved in one incident.

Bussell began to be exposed to sexually-charged comments by Bob Render as soon as she came to the Inpact Center in August, 2000. (R2-109-54-55). Render spoke loudly, and constantly demeaned women, talking about the sex that he had the night before, about how he cheated on his wife, the strip clubs that he would go to, the shape of the women's bodies, and how many girlfriends that he had on the "side", and he uttered "come-ons" to Bussell. (R2-109-50-53; 62-63).

When Render first touched Bussell (in October, 2000), Bussell "was bending down to one of the shelves to get the [Nextel] phones, which we called radios off the shelf to take them back to my desk to assemble them." (R2-109-63-64). Bussell described the first time that Render touched her as follows:

> I was bending over picking up the radios when I felt someone pulling the back of my pants down and the top of my shirt up, and like pulling – I

mean, like, not just pulling a little bit, like grabbing down and yanking my shirt up. . . .

* * *

A: When he pulled my pants down, he said [something to me].

Q: Nothing else?

A: No.

Q: Did he make any comment about your body, your buttocks or –

A: He didn't need to, he was touching it. . . . [H]e had to touch my body to get my clothes. My clothes weren't just like loose off of me. So, to rip down my pants, he's touching my lower back and my butt; and to rip up my shirt, he's touching my back.

* * *

Q: Okay. . . . You mean that he pulled down your pants and underwear?

A: Yes.

Q: Was it actually visible? I mean did you feel that?

A: He pulled my pants down. I mean his fingers were in the back of my pants and he pulled them down. My tattoo goes really far, pretty far down; and, yes, my pants were pulled down, so there was part of –

Q: Your buttocks were showing?

A: Yes.

Q: Was he also grabbing your shirt at the same time?

A: Yes.

(R2-109-77-78, 109-10; R2-110-350-51).

This sexual assault was also physically violent, as Bussell testified that when Render ripped her pants down he was touching her bare bottom, as follows:

> A: When he pulled my pants down, he said [something to me].
>
> Q: Nothing else?
>
> A: No.
>
> Q: Did he make any comment about your body, your buttocks or –
>
> A: He didn't need to, he was touching it. . . . [H]e had to touch my body to get my clothes. My clothes weren't just like loose off of me. So, to rip down my pants, he's touching my lower back and my butt; and to rip up my shirt, he's touching my back.

(R2-109-109-10).

After Render pulled Bussell's pants down, and after a sexual harassment meeting was held, Render continued to sexually touch Bussell against her will. (R2-109-81-82). Render "began on a constant basis" to walk behind Bussell and rub his crotch up against Bussell's body. (R2-109-81). Bussell further described this sexually harassing touching as follows:

> But I would be sitting down and he would walk by and I could feel his pants and the contents rubbing up against my shoulder. I would turn around and he would wink at me funny or smile at m\ funny, and I would get grossed out. . . .

Q: [D]id he literally turn his body sideways to place his genitals against you?

A: Yeah, if you want, I'll show you what he did.

* * *

Q: Okay. But did you go to anyone, any supervisor and say to anyone, hey, he just rubbed his genitals up against me?

A: Yeah . . . any time an incident would happen, I would go to Tom.

(R2-110-305-06-08). Render would also stand behind Bussell and look down Bussell's shirt at her breasts. (R2-110-305). Render also sexually harassed Bussell with his verbal comments, as *he would tell her on a daily basis* that: her hair was getting really long, and that it was growing so fast because she was sexually active; why would you want to be with a boy when you could be with a man; he made sexual comments about her lips, like "wow, those are some pretty thick lips"; he called Bussell "dirty names"; he complimented Bussell on her breasts, and how every part of her body was exactly how he liked it. (R2-110-311; R2-109-165). The severity and perversity of the sexual harassment left Bussell traumatized, as she would not be able to sleep, and she would cry all night long. (R2-109-123, 120, 71, 94, 116, 160; R2-110-214, 244, 244-45, 270-71, 297, 301).

It is not in dispute that Bussell properly complained about the sexual harassment. (R2-112-127-28). Karge conceded that Bussell told him that she thought Render's sexually harassing comments were directed at her. (R2-112-130).

Although Bussell testified that she complained to Pennington constantly (as set forth above), Pennington testified that Bussell only complained to her on two occasions. (R2-116-58-59). Pennington performed absolutely no investigation of Bussell's complaints, and she denied that she knew that there was any harassment occurring. (R2-116-48, 49, 60).

Covington conceded that the offensive comments that Bussell's co-workers told her Render was uttering created a hostile work environment, as follows:

> Q: Do you think it [Render's comments] creates a hostile work environment. [objections omitted]
>
> A: Yes. . . .
>
> Q: Yes. And did you find that there was, indeed, a hostile work environment where Meghan worked [objections omitted]
>
> A: Yes.

(R2-95-118-19).

On January 24, 2001, Motorola HR drafted an Incident Report which contained the following findings as to Render:

> Upon investigation that was conducted regarding allegations in the INPACT CENTER, it was verified that on numerous occasions you used inappropriate, foul and abusive language intimidating others in the conversations you were holding.
>
> In your meeting with Human Resources dated 1/19/01, you admitted that you made inappropriate comments. This constitutes a Class II infraction, contributing to a hostile/intimidating work

> environment and is in violation of Motorola Policy.

(R2-93-Ex.20).

Motorola's Statement to the EEOC stated that "Render was given an incident warning and put on probation for a one year period with the understanding that any further violations of the sexual harassment policy would result in his immediate termination." (R2-116-180-81). Martha Jaramillo, a high-level management official of Motorola, who was the ultimate decision-maker concerning the discipline and resolution arising out of Bussell's complaints, testified that Render "created a hostile work environment discussing strip clubs and making comments and unwanted words." (R2-97-100).

In Karge's findings concerning the sexual harassment allegations, Karge found, on January 29, 2001, as follows: "hostile work environment Reason: Work Conditions was the reason. Resigned due to continuing harassment, and being made to feel uncomfortable. Because the sexual harassment case was so drawn out and not alot [sic] of support in her dept [sic] which was causing her to get ill. . . . " (R2-93-Ex.21) (dated Feb. 2 and 15, 2001). Karge testified that these conclusions were his own, and he agrees with them. (R2-112-173-74).

Direct evidence of retaliation exists, because Karge told Bussell that she was not going to be made a permanent Motorola employee (a "Motorolan") "because [she] complained too much." (R2-109-159). On pages 268 and 168, Bussell testified that "Karge told [Bussell] . . . that [she would not be a permanent Motorola employee] because she was complaining. . . . " (R2-110-268, 168).

Motorola admitted on page 48 in its Brief that Bussell was docked pay. Bussell lost income because of illness brought on by the sexual harassment, and because of the illness she was sent home without pay. (R2-109-159-62) (indicating she was sent home without pay even in January, 2001, after her complaints became known to Motorola HR, that she was sent home without pay on January 19 and 31, 2001). Bussell missed out on being made a permanent Motorola employee because of her complaints, and the greater pay and health care benefits associated with that permanent employment. (R2-159, 168, 169; R2-110-265). Bussell was given more than 3-5 times the work as similarly situated co-workers were given, shortly after her sexual harassment complaints. (R2-109-189-90, 193-94; R2-110-220, 260-64).

Karge told Bussell that he would "write a letter that says it was a forceful quit . . . [t]hat [Bussell] was forced to leave my job because of unhealthy circumstances, because they couldn't protect her from sexual harassment, [and] because they couldn't protect [Bussell] from retaliation. . . ." (R2-109-127). Kathy Brodeur did not allow Karge to give such a letter to Bussell. (R2-110-212-13). Brodeur (one of Adecco's managers) testified that Bussell did not quit. (R2-99-92). Brodeur believes that Bussell was essentially forced out of her employment "due to continuing harassment." (R2-99-168).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW PRESENTS AN IMPORTANT, BUT UNANSWERED QUESTION CONCERNING THE DEFINITION, USE AND EFFECT OF "DIRECT EVIDENCE" IN AN EMPLOYMENT CASE AND THERE IS A SPLIT IN THE CIRCUIT COURTS OF APPEALS REGARDING THIS ISSUE.

In order to establish an employment discrimination case, a plaintiff may use one or more of three methods: 1) presenting direct evidence of discriminatory intent; 2) meeting the burden-shifting test set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); or 3) through statistical proof of a pattern and practice of discrimination. *Standard v. A.B.E.L. Serv., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998).

Whether evidence is direct or circumstantial evidence is a critical distinction in an employment discrimination case because the *McDonnell Douglas* framework is inapplicable where there is adequate direct evidence of discriminatory intent. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (O'Connor, J., concurring). Also, under the *Price Waterhouse* framework, a proffer of direct evidence shifts the burden of proof to the defendant-employer, who must then prove, notwithstanding the direct evidence, that it would have terminated the plaintiff anyway. *Ferrill v. The Parker Group, Inc.*, 168 F.3d 468, 472 (11th Cir. 1999); *Evans v. McClain of Georgia, Inc.*, 131 F.3d 957, 962 (11th Cir. 1997). Finally, this burden shift to the defendant-employer is important because the proffer of direct evidence, viewed in the light most favorable to the non-moving party, necessarily creates a genuine issue of

material fact that precludes summary judgment. *Seay v. Tenn. Valley Authority*, 339 F.3d 454, 463 (6th Cir. 2003) (holding that "[t]o avoid a grant of summary judgment on a Title VII claim, a plaintiff must either provide direct evidence of discrimination or establish a prima facie case" under *McDonnell Douglas*).

In the instant case, the comments, if believed, constitute direct evidence of discrimination, which in turn requires the denial of summary judgment, because Bussell's Adecco supervisor (Karge) told her that she was not going to get a permanent Motorola position – increased pay and benefits – because she "complained too much" (direct evidence of retaliation), Kathy Brodeur's statement that Bussell "was forced out due to continuing harassment" (direct evidence of constructive discharge), Karge's written journal stating that Bussell "resigned due to continuing harassment" (direct evidence of constructive discharge) and both Respondents' findings that she was subjected to sexual harassment constitute direct evidence, and require the denial of summary judgment, concerning Bussell's sexual harassment, retaliation, and constructive discharge claims. *Id.* However, the lower courts did not even discuss the comments. There is clearly a split in the circuits concerning *Seay*, and the law in the Eleventh Circuit applied by the lower courts in this case.

What evidence constitutes direct evidence as opposed to circumstantial evidence is not easy to determine. *Dominguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 429 (1st Cir. 2000) (admitting that "[i]t is often quite difficult to draw the line between what is 'direct evidence' and what is 'circumstantial evidence.' "). The standard for what constitutes direct evidence is in conflict in the circuits.

The district courts have cried out for guidance in this area, *see, e.g.*, *Dilla v. West*, 4 F. Supp. 2d 1130, 1137-38 (M.D. Ala. 1998) and *Hearn v. GE*, 927 F. Supp. 1486, 1497-98 (M.D. Ala. 1996), and the *Dilla* case observed that:

> the determination of whether the plaintiffs have established age discrimination by direct evidence is somewhat complicated by the fact that the definition of what constitutes direct evidence of discrimination is subject to frequent shifts, even among different panels of the Eleventh Circuit.

Dilla, 4 F. Supp. 2d at 1137. The *Dilla* court stated that the Eleventh Circuit's different definitions of direct evidence were full of "murkiness." *Id.* at 1138 n.9.

The *Dilla* court noted that there seemed to be two different definitions of direct evidence in the Eleventh Circuit. For the first definition, the court cited to *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th Cir. 1990), which applied a relatively broad definition of direct evidence, explaining that "direct evidence relates to actions or statements of an employer reflecting a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee."

For the second definition, the court noted that in *Clark v. Coats and Clark, Inc.*, 990 F.2d 1217, 1223 (11th Cir. 1993), the panel stated that direct evidence of employment discrimination is evidence that "is sufficient to prove discrimination without inference or presumption."

Judge Thompson in *Dilla* was greatly troubled by these different and contradictory definitions for direct evidence, and asked several rhetorical questions in his opinion, as follows:

> [I]t is unclear what the Eleventh Circuit meant by its narrower definition that direct evidence is "evidence sufficient to prove discrimination without inference or presumption." *Clark*, 990 F.2d at 1223. Does the definition mean that the evidence is sufficient if it reflects, without inference or presumption, a mere discriminatory bias toward the group to which the employee belongs, in other words, that the evidence need only reflect a general discriminatory bias? Or does the direct evidence definition require more, that is, that the evidence must reflect, without inference or presumption, a specific discriminatory intent to commit the challenged conduct?

Dilla, 4 F. Supp. 2d at 1138. The court in *Dilla* urged that drawing the distinction between direct and circumstantial evidence in a discrimination case is needless and implausible. *Id.* n.9.

Six years ago, the Eleventh Circuit issued an opinion that was a veritable treatise with respect to the confusion surrounding direct evidence in the Eleventh Circuit. *Wright v. Southland Corp.*, 187 F.3d 1287 (11th Cir. 1999). Unfortunately, however, that opinion was a stand-alone opinion by Judge Tjoflat, as the two other panel members (Judges Cox and Hull) refused to join in the opinion. Consequently, the *Wright* case has not been relied upon by many district courts or subsequent panel opinions. The *Wright* case held that there have generally been two different definitions used by the Eleventh Circuit concerning direct evidence, the "preponderance" definition ("evidence from which a reasonable factfinder could find, by a preponderance of the evidence, a causal link between an adverse employment action and a protected personal characteristic") and the "dictionary" definition ("evidence

that, if believed, proves the existence of a fact in issue without inference or presumption"). *Wright*, 187 F.3d 1287, 1294. The *Wright* court concluded that the preponderance definition was the law of the Eleventh Circuit. Nevertheless, after *Wright*, panels of the Eleventh Circuit have continued to hold that the dictionary definition of direct evidence is applicable. *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1087-88 (11th Cir. 2004).

Because of the inconsistencies as to the definition of direct evidence in the Eleventh Circuit panel opinions, there are published opinions with almost identical facts where one panel opinion holds that the evidence constitutes direct evidence and the other holds that it does not. *Compare Buckley v. Hospital Corp. of Am.*, 758 F.2d 1525, 1530 (11th Cir. 1985) (decision-maker's statement that the hospital needed "new blood" and that the plaintiff's advancing age impeded her constituted direct evidence in an age case) *with Damon v. Fleming Supermarkets, Inc.*, 196 F.3d 1354, 1359 (11th Cir. 1999) (decision-maker's statement that "what the company needed was aggressive, young men like [the younger person promoted] to be promoted" was not direct evidence). Bussell has direct evidence in this case, because of the admissions that she was subjected to sexual harassment, she was constructively discharged, and the direct evidence that she was retaliated against "not given the permanent position because she "complained too much" about sexual harassment).

Conflicting understandings of what constitutes "direct evidence" plague other circuits as well. In the First Circuit, "[c]omments which, fairly read, demonstrate that a decisionmaker made, or intended to make, employment decisions based on forbidden criteria constitute direct evidence of discrimination", constitute direct evidence.

Febres v. Challenger Caribbean Corp., 214 F.3d 57, 61 (1st Cir. 2000)

The Third Circuit has noted that "while courts agree on what is *not* direct evidence – *e.g.*, statements by non-decisionmakers, statements by decisionmakers unrelated to the contested employment decision, and other 'stray remarks' – there is no consensus on what is [direct evidence]." *Fakete v. Aetna, Inc.*, 308 F.3d 335, 338 (3d Cir. 2002).

In the Fifth Circuit, "direct and material evidence" of employment discrimination applies to remarks that are: "(1) related to [the protected class of persons of which plaintiff is a member]; (2) proximate in time to the employment action; (3) made by an individual with authority over the employment decision; and (4) related to the employment decision at issue." *Vance v. Union Planter's Corp.*, 209 F.3d 438, 442 (5th Cir. 2000) (citing *Krystek v. University of S. Miss.*, 164 F.3d 251, 256 (5th Cir. 1999)).

In the Sixth Circuit, while "[t]he Supreme Court has now made it clear that 'direct evidence' is not essential to prove a mixed-motive employment discrimination case . . . the various employment-oriented definitions of direct evidence . . . have lingered on." *Peyton v. Kellermeyer Co.*, 115 Fed.Appx. 825, 829, n.1 (6th Cir. 2004). Another panel opinion noted that "[d]irect evidence 'is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.'" *Weberg v. Franks*, 229 F.3d 514, 522 (6th Cir. 2000) (citing *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999)).

The Seventh Circuit also presents a choice of definitions of "direct evidence": "Direct evidence is evidence

which if believed by the trier of fact, will prove the particular fact in question without reliance on inference or presumption." *Walker v. Glickman*, 241 F.3d 884, 888 (7th Cir. 2001). At the same time, "[d]irect evidence is evidence that "'in and of itself suggests' that someone with managerial authority was 'animated by an illegal employment criterion.'" *Bekker v. Humana Health Plan, Inc.*, 229 F.3d 662, 670 (7th Cir. 2000) (citing *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044 (7th Cir. 1999) and *Venters v. City of Delphi*, 123 F.3d 956, 972 (7th Cir. 1997)). Foreshadowing Justice Thomas' opinion in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003), the Seventh Circuit has also noted that, where a plaintiff has presented sufficient evidence for a jury to conclude that the employer's decision was motivated by an illegal consideration, "the question [of] whether the bulk of [the plaintiff's] evidence of discrimination is direct or circumstantial . . . is a distinction without legal consequence." *Mathur v. Board of Trustees of South. Ill. Univ.*, 207 F.3d 938, 942 (7th Cir. 2000).

Six years ago in the First Circuit, Judge Selya provided an analysis of the varying approaches the several circuits take toward defining direct evidence in *Fernandez v. Costa Brothers Masonry, Inc.*, 199 F.3d 572, 582 (1st Cir. 1999), dividing the definitions used by the courts as falling under one of three rubrics: A) "classic" ("evidence which, if believed, suffices to prove the fact of discriminatory animus without inference, presumption, or resort to other evidence"); B) "animus plus" ("evidence, both direct and circumstantial, of conduct or statements that (1) reflect directly the alleged discriminatory animus and (2) bear squarely on the contested employment decision"); and C) "animus" (evidence "that as long as [it] is tied to the

alleged discriminatory animus, [] need not bear squarely on the challenged employment decision").

While Justice Thomas' opinion in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003), made clear that direct evidence, however it is defined, is not needed for a plaintiff to obtain a mixed-motive jury instruction, the definition, use, and effect of direct evidence in the summary judgment context of employment discrimination cases remains unclear, with different circuits now rendering differing opinions concerning nearly identical evidence. In particular, because the definition of what constitutes direct evidence bears directly on a court's decision to grant or deny summary judgment, as well as on whether a plaintiff must proceed under a *McDonnell Douglas* pretext framework, guidance as to the effect of properly-defined direct evidence on a defendant-employer's motion for summary judgment would substantially lighten the dockets of the federal courts.

II. THERE IS A SPLIT IN THE CIRCUITS REGARDING THE HOLDING OF *WHITE*, CONCERNING WHAT IS NECESSARY TO ESTABLISH ADVERSE EMPLOYMENT ACTION, BECAUSE OTHER CIRCUITS HAVE FOUND THAT THE TYPES OF ADVERSE EMPLOYMENT ACTION BUSSELL SUFFERED ARE ACTIONABLE, AND CASES SO FOUND EVEN BEFORE *WHITE*.

Despite the evidence in this case that Bussell suffered several different types of adverse employment action, which clearly appear to be actionable under the authority of *White*, and despite how the other circuits have interpreted *White*, the Eleventh Circuit in this case did not

interpret *White* to require that any of the adverse employment action was actionable for retaliation, and held as follows:

> In *Burlington Northern*, the Supreme Court considered the scope of the anti-retaliation provision of Title VII. . . . The Court held that the 'the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace,' and 'the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant.' 126 S. Ct. at 2409. Neither holding applies to Bussell's appeal. The only alleged retaliatory acts of which Bussell complained were employment related, and the alleged retaliatory acts were either not retaliatory or were not acts that 'would have been materially adverse to a reasonable employee.'

This holding requires the Court to resolve a split in the circuits. As set forth below, the other circuits have held that *White* clearly enunciated a new standard for what constitutes adverse employment action, namely, if the adverse employment action could dissuade a reasonable employee into not engaging in protected activity, it is adverse employment action, and the Court should resolve this split.

The original panel of the Eleventh Circuit held, concerning her retaliation claims, that:

> there is no record evidence to support Bussell suffered from an adverse employment action by either of the defendants. We affirm this issue for the reasons set forth in the district court's order.

> There is no record evidence to support a constructive discharge claim. . . . Bussell testified that at the time she resigned from Motorola, the sexual harassment had already stopped. There is no record evidence that she was compelled to leave Motorola at that time.

(*Last Page of Order*). In Bussell's first petition for *certiorari*, she argued (as she had in the lower courts) that she suffered different forms of adverse employment action after she repeatedly complained of sexual harassment, namely, 1) having her pay docked; 2) being given 3-5 times more work; 3) not being made a permanent Motorola employee (with increased pay and benefits); and 4) by being constructively discharged. (*Statement of Facts in Opposition to Summary Judgment* at p. 17, ¶ 138); (*Brief on Merits* 33-34); and (*Certiorari Petition* at p. 13). The facts associated with these forms of adverse employment action will be addressed in turn in this section.

Dock in Pay

Concerning the dock-in-pay claim, Motorola admitted on page 48 of its Response Brief in this Court that Bussell was docked pay, as she lost income because of illness (extreme emotional distress) brought on by the sexual harassment, which resulted in her being sent home without pay. (R2-109-159-60; 161-62; R2-110-213) (indicating she was sent home on several different days without pay even in January, 2001, after her complaints became known to Motorola HR).

Three-five Time Increase In Workload – Being Called a Liar and Baby

Bussell was given more than 3-5 times the work as similarly situated co-workers were given. (R2-109-189-90, 193-94; R2-110-220, 260-64). Bussell's work load began to be increased by Laila Pennington (Bussell's Motorola supervisor) as soon as Bussell complained about her pants being pulled down by Render. (R2-110-260). Bussell immediately complained of the sexual touching to Pennington; however, for the next three months, Bussell continued to be sexually harassed. (R2-109-66-67). When Bussell first told Pennington about the touching, Pennington accused Bussell of lying, and became nasty toward Bussell. (R2-109-67, 69). Bussell described her complaint to Pennington, and Pennington's reaction, as follows:

> I went to her [Pennington]. I was very upset. I said he touched me. I don't know what to do. You know, I told you before. And she said – she said, you're a liar. You're a problem-causer.

(R2-109-69-70). Bussell repeatedly complained about the sexual harassment to Pennington, but every time that Bussell complained, Pennington would call her a liar, a baby, and a problem-causer, and put Bussell down. (R2-109-189). Pennington yelled and screamed at Bussell for no legitimate reason, and attempted to get her into trouble with her Adecco supervisor by contriving poor performance allegations, although Bussell did nothing wrong, and was a good employee. (R2-110-197).

Being Made Permanent Motorola Employee

Bussell missed out on being made a permanent Motorola employee, and the greater pay and health care

benefits associated with that permanent employment, because of her complaints. (R2-159, 168, 169; R2-110-265). Direct evidence of retaliation exists, because Tom Karge (Adecco supervisor) told Bussell that she was not going to be made a permanent Motorola employee (a "Motorolan") "because [she] complained too much." (R2-109-159). On pages 268 and 168, Bussell testified that "Karge told [Bussell] . . . that [she would not be a permanent Motorola employee] because she was complaining. . . . " (R2-110-268, 168). Bussell told HR about Pennington's retaliatory threats, and HR did not deny them. (R2-109-168).

Bussell testified that Karge made it clear that Pennington had the power to prevent Bussell from becoming a permanent employee, as follows:

> A: [After the pulling-down-the-pants incident, which Bussell complained about as being sex harassment]. Yes. I told Tom what had happened. Tom came back to me. All of a sudden, Tom's telling me that both Russ and I are no longer eligible to be made Motorolans because Laila has made it impossible for us.

(R2-109-168). After six to eight months at work, the temporary employees were being made permanent employees. (R2-109-169). Bussell testified as follows:

> Q: Did anyone tell you when you went to Motorola that this was a six-month assignment?
>
> A: Nope. They told us it was temporary, but they said it could be six months to a year to longer, but that we had the opportunity after six months to be transferred to be a Motorolan.

(R2-109-183). Bussell was told that would not get such a position. (R2-109-265).

Constructive Discharge

In Karge's findings concerning the sexual harassment allegations, Karge found that Bussell was constructively discharged, as he wrote the following concerning why he felt she was no longer employed by Defendants: "hostile work environment Reason: Work Conditions was the reason. Resigned due to continuing harassment, and being made to feel uncomfortable. Because the sexual harassment case was so drawn out and not alot [sic] of support in her dept [sic] which was causing her to get ill. . . . " (R2-93-Ex.21) (dated Feb. 2 and 15, 2001). Karge testified that these conclusions were his own, and he agrees with them. (R2-112-173-74). There is additional direct evidence of constructive discharge, because Kathy Brodeur (one of Adecco's managers and Karge's supervisor) testified that Bussell did not quit. (R2-99-92). Brodeur believes that Bussell was essentially forced out of her employment "due to continuing harassment." (R2-99-168).

Bussell plainly testified that she was not given an opportunity to have a safe harassment-free environment at Motorola. (R2-109-174). On January 26, 2001, Karge told Bussell that he would no longer give any of Bussell's notes to HR, that they did not like the fact that Bussell was still complaining, he told Bussell that HR was not going to help her, to stop complaining, to get over it, to get a new job, and to get a lawyer. (R2-109-126, 128; R2-110-255-56). Karge told Bussell that she would either have to work with Render, work with Pennington, or leave employment with the Defendants. (R2-109-126-27, 162; R2-110-216, 253).

Karge told Bussell that he would "write a letter that says it was a forceful quit . . . [t]hat [Bussell] was forced to leave [her] job because of unhealthy circumstances, because they couldn't protect her from sexual harassment, [and] because they couldn't protect [Bussell] from retaliation. . . . " (R2-109-127). Kathy Brodeur did not allow Karge to give such a letter to Bussell. (R2-110-212-13).

On January 31, 2001, Pennington had treated Bussell extremely rudely. (R2-110-250-51) (stating that Pennington "ripped [Bussell] to shreds that day in front of so many people"). Pennington screamed at Bussell for no apparent reason. (R2-110-251-52). Bussell drafted a handwritten note describing some of Pennington's obviously retaliatory behavior (R2-93-Ex.26), and testified she told Karge on Jan. 31, 2001, it was obvious Pennington was attempting to force her to quit. (R2-110-253).

While below Adecco argued that the harassment stopped by December 2000 (*Response to Cert. Petition* at 9-10), there is disputed evidence concerning that issue, because Karge admitted that Bussell was still complaining about sexual harassment after the December 26, 2000, meeting she had with Covington. (R-112-133-34).

All of these arguments (concerning the various instances of adverse employment action) were clearly raised below. *See Bussell's Statement of Disputed Facts in Opposition to Defendants' Motions for Summary Judgment* (pp. 13, 15, 16, 127, 18; ¶¶ 88, 114-16, 120, 125-27, 135), and *Memorandum of Law in Opposition to Summary Judgment* (pp. 2, 8, 13-16, 17, and 20), and (*Eleventh Circuit Brief* at pp. 26, 30, 31-32, 33, and 35) (*See generally Reply to Cert. Petition* at 5, 8-9).

The Eleventh Circuit's application of the case of *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006), requires that the Court provide further guidance, because the panel opinion is contrary to other circuit's cases interpreting *White*. In *White*, this Court was faced with conflicting panel opinions interpreting Title VII's anti-retaliation clause (42 U.S.C. § 2000e-3(a)), specifically concerning the issue of what constitutes adverse employment action (some – like the Eleventh Circuit – required an ultimate employment action, *see Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 587 (11th Cir. 2000), and others required merely conduct designed to dissuade an employee from complaining about discrimination). *Id.* at 2408. This Court noted that the anti-retaliation clause forbids an employer from "discriminate[ing] against" an employee because that individual "opposed any practice" made unlawful by Title VII. *Id.* The Court held that a plaintiff need only show that

> a reasonable employee would have found the challenged action materially adverse, "'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'"

Id. at 2415 (citations omitted). Notably, the Court held that the anti-retaliation clause prohibits "employer actions that are likely to deter victims of discrimination from complaining to the EEOC, the courts, and their employers." *Id.* (citing 2 *EEOC Compliance Manual* § 8. pp. 8-13 (1998 ed.)).

In *White*, the defendant, after the plaintiff complained of sex discrimination and harassment, reassigned her job duties, by taking her forklift duties (which she enjoyed and which were her primary duty) and giving her more

general laborer duties, and by suspending her for 37 days *with* pay. To give the courts guidance, the Court gave examples of what it believed constitutes adverse employment action for purposes of the anti-retaliation clause, and it held that the following two examples constitute adverse employment action: 1) a schedule change in an employee's work schedule, if the worker needed a certain schedule because of child-care concerns, and 2) the exclusion of an employee from a weekly training lunch that contributes to professional development. The Court specifically agreed with the EEOC's Compliance Manual which states that "retaliatory work assignments [are] a classic and widely recognized example of forbidden retaliation." *Id.* at 2416 (citing *EEOC Compliance Manual* § 614.7 (1991 ed.)). The Court also approved of the EEOC's enjoining employers from assigning unpleasant work assignments on employees who have complained about discrimination. *Id.*

Following *White*, and even pre-*White*, numerous court of appeals decisions hold, contrary to the Eleventh Circuit's holding in this case, that actions that result in tangible economic consequence (loss in pay), failure to promote, verbal abusive harassment, and constructive discharge are materially adverse employment actions that are actionable. *Rivera-Martinez v. Commonwealth of Puerto Rico*, 2007 WL 16069 (1st Cir. 2007) (holding so for demotions affecting pay, refusals to promote, and "toleration of harassment by other employees"); *Noviello v. City of Boston*, 398 F.3d 76 (1st Cir. 2005) (holding that the creation of and perpetuation of hostile work environment constitutes actionable retaliation); *Kessler v. Westchester County Dep't of Soc. Servs.*, 461 F.3d 199, 207 (2d Cir. 2006) (holding so for termination, wage loss); *Hare v. Potter*, 2007 WL 841031 (3d Cir. 2007) (failure to promote

and retaliatory harassment); *Csicsmann v. Sallada*, 2006 WL 3611729 (4th Cir. 2006) (holding so for negative change in salary, benefits, and promotional opportunities); *Schmidt v. Canadian Nat'l Ry. Corp.*, 2007 WL 755171 (7th Cir. 2007) (recognizing that dock in pay constitutes actionable retaliation); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 965 (9th Cir. 2004) (holding that verbal abuse and intimidation constitutes retaliation); *McGowan v. City Eufala*, 472 F.3d 736, 742 (10th Cir. 2006) (holding so for firing, failure to promote, change in benefits).

Almost without exception, the above cases note that the standard enunciated in *White* rejected the old approach that there must be an ultimate employment action for retaliation causes of action, but rather simply actions that might well dissuade a reasonable person from engaging in protected activity, and that such actions may include those that take place outside the workplace. *See, e.g., McCullough v. Kirkum*, 2006 WL 3786043 *3 (5th Cir. 2006). For some reason, the Eleventh Circuit eschews this clear change in legal standard, and is applying the old ultimate employment action standard, which requires further guidance.

In this case, Bussell was retaliatorily assigned 3-5 times more work shortly after she complained of sexual harassment. The manner in which the extra work was assigned was done so in a spiteful way and affected Bussell to the extent that a jury could find that such extra work was clearly adverse employment action, and Pennington's calling Bussell a "baby" and a "liar" and screaming at her for complaining of harassment would deter a reasonable employee from complaining.

Concerning the docking in pay, Bussell clearly suffered adverse employment action, and Motorola admitted that Bussell had her pay docked. (*Motorola's Brief to Eleventh Circuit* at 48) (citing R2-78-159-161). Under *White*, clearly economic loss *per se* requires the conclusion that a jury could find adverse employment action, because the Court found that retaliation may lie without it.

Along those same lines, Defendants' failure to make Bussell a permanent Motorola employee constitutes adverse employment action. Bussell testified that Karge made it clear that Pennington had the power to prevent Bussell from becoming a permanent employee, and that she exercised that power. (R2-109-168-69, 183, 265). Failure to make Bussell a permanent employee is very much akin to a failure to promote that resulted in economic harm to Bussell and is clearly actionable. *Carter v. Three Springs Residential Treatment*, 132 F.3d 635 (11th Cir. 1998) (holding that failure to promote is an actionable adverse employment action under Title VII), and when she was sent home without pay. *Doe v. Dekalb County Sch. Dist.*, 145 F.3d 1441 (11th Cir. 1998) (holding that adverse employment action which causes economic loss is *per se* and adverse employment action for purposes of this second element, citing prior Eleventh Circuit cases).

The proffer of direct evidence (the comments from Karge and Pennington concerning the failure to make Bussell a permanent employee, the findings of constructive discharge by Karge and Brodeur, and Motorola's admission in its Brief on the Merits that Bussell was docked pay) requires that summary judgment be denied on those issues. *Bass v. Orange County Commission*, 256 F.3d 1095, 1112 (11th Cir. 2001) (holding that "where the nonmovant presents direct evidence . . . summary judgment is

not appropriate"). It is reversible error to apply the *McDonnell Douglas* inferential model when there is direct evidence of discrimination. *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th Cir. 1990).

Defendants argued below that nowhere in the record is there evidence Pennington could have made the decision to promote Bussell into a permanent Motorola employee. Defendants are looking at the situation backwards. The question is not whether Pennington had that authority (although the above evidence indicates she did) the question is whether Pennington could have made sure that Bussell was not made permanent, such as by disciplining her. Bussell testified that as soon as she told Karge that Render pulled her pants down, Karge went and talked to Pennington and then told Bussell that Pennington told him that she was going to make it impossible for Bussell to become a permanent employee. (R2-109-167-68). Pennington thus had the means to make sure that Bussell could not become a permanent employee. Bussell also testified that she was told by her supervisors that she was one of the best employees that the Defendant had, and that she could become a permanent Motorola employee within six months of her hire. (R2-109-177, 183).

Questions of fact exist as to whether Bussell was constructively discharged (a form of retaliation), because of Kathy Brodeur's testimony (which constitutes direct evidence, as does Karge's finding that she was forced out due to continuing harassment) that Bussell was essentially forced out "due to continuing harassment (R2-99-92), Karge's admission that Defendants could not protect Bussell from harassment or retaliation (R2-109-127), and Karge's statement that Bussell could either continue to work for Pennington (the individual retaliating against

her and calling her names for complaining), Render (the sexual harasser), or she could leave. (R2-109-126-27, 162; R2-110-216, 253). A reasonable jury could find retaliatory constructive discharge based on these facts. Accordingly, the Court should grant certiorari to resolve this important conflict.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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May, 2007

2006 WL 4476198

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-12120

D.C. Docket No. 02-60019-CV-SH

MEGHAN BUSSELL,

Plaintiff-Appellant,

versus

MOTOROLA, INC.,
a Delaware Corporation,
ADECCO EMPLOYMENT SERVICES, INC.,
a Delaware Corporation,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(December 21, 2006)

ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

Before DUBINA and PRYOR,* Circuit Judges.

PER CURIAM:

This appeal is before us on remand from the Supreme Court of the United States with instructions to reconsider our panel opinion decision, 141 Fed. Appx. 819 (11th Cir. 2005), in the light of *Burlington Northern and Santa Fe Railroad Co. v. White*, 126 S. Ct. 2405 (2006). *Bussell v. Motorola, Inc.*, ___ S. Ct. ___, 2006 WL 2794976 (2006) (mem). After consideration of the supplemental briefs, we reinstate our previous decision because it is not affected by *Burlington Northern*.

In *Burlington Northern*, the Supreme Court considered the scope of the anti-retaliation provision of Title VII, 42 U.S.C. § 2000e-3(a). The Court held that "the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace," and "the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant." 126 S. Ct. at 2409. Neither holding applies to Bussell's appeal. The only alleged retaliatory acts of which Bussell complained were employment related, and the alleged retaliatory acts were either not retaliatory or were not acts that "would have been materially adverse to a reasonable employee."

OPINION REINSTATED.

---

* Due to the death of Honorable Paul H. Roney, United States Circuit Judge for the Eleventh Circuit, on 16 September 2006, this decision is rendered by a quorum. 28 U.S.C. § 46(d).

Supreme Court of the United States

No.

05-1051

MEGHAN BUSSELL,

Petitioner

v.

MOTOROLA, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

THIS CAUSE having been submitted on the petition for a writ of certiorari and responses thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the petition for a writ of certiorari is granted. The judgment of the above court is vacated with costs, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Burlington N. & S. F.R. Co. v. White*, 548 U.S. ___ (2006).

IT IS FURTHER ORDERED that the petitioner Meghan Bussell recover from Motorola, Inc., et al., Three Hundred Dollars ($300.00) for costs herein expended.

October 2, 2006

Clerk's costs: $300.00

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-12120-HH

MEGHAN BUSSELL,

Plaintiff-Appellant,

versus

MOTOROLA, INC.,
a Delaware Corporation
ADECCO EMPLOYMENT SERVICES, INC.,
a Delaware Corporation,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed Feb. 15, 2007)

Before: DUBINA and PRYOR*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

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* Due to the death of Honorable Paul H. Roney, United States Circuit Judge for the Eleventh Circuit, on 16 September 2006, this decision is rendered by a quorum. 28 U.S.C. § 46(d).

Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ William H. Pryor, Jr.
UNITED STATES
CIRCUIT JUDGE

FILED
SEP 13 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1499

IN THE

Supreme Court of the United States

MEGHAN BUSSELL,

Petitioner,

v.

MOTOROLA, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ADECCO USA, INC.

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QUESTIONS PRESENTED

1. Whether this case presents an appropriate vehicle for resolving the conflict among the lower federal courts regarding the proper standard of "direct evidence" to be applied in employment discrimination cases?

2. Whether there is a split in the circuits regarding the interpretation of *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. ____, 126 S. Ct. 2405 (2006), with respect to what constitutes an adverse act of retaliation under Title VII of the Civil Rights Act of 1964, § 2000e-3(a)?

3. Whether the Eleventh Circuit complied with this Court's previous remand?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Adecco USA, Inc., is wholly owned by Adecco, Inc. and its ultimate parent is Adecco SA, a foreign corporation.

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INTRODUCTION

With respect to the first issue identified by Petitioner, this case is not an appropriate vehicle to resolve the apparent split among the federal courts concerning the proper standard of "direct evidence" to be applied within the context of an employment discrimination case. The principal reason that this matter is not properly postured to resolve this conflict is that the evidence which Petitioner relies upon as direct evidence of retaliation is in fact inadmissible hearsay, and Petitioner never argued to the courts below that she had direct evidence of constructive discharge or sexual harassment. Accordingly, Petitioner is precluded from making such an assertion at this time. Moreover, there are other independent grounds for dismissing Plaintiff's claims. Complicating the issue further is the fact the Court cannot reach this issue without overturning fact findings adverse to Petitioner. This case is also not proper for resolving the split in the circuits because it is not binding precedent as the Eleventh Circuit's opinion in the case *sub judice* is unpublished in the Federal Reporter.

As to the second issue stated in the petition, there is no conflict among the circuits regarding the interpretation of *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. __, 126 S. Ct. 2405 (2006), with respect to what constitutes an adverse act of retaliation under Title VII of the Civil Rights Act of 1964, § 2000e-3(a). Rather, the Eleventh Circuit expressly adopted and applied the standard set forth by this Court in *White* for retaliation cases. Even if there was a conflict among the circuits, which Respondent denies, the Court should deny the Petition for Writ of Certiorari because the Court's decision in *White* is relatively recent and the courts of appeals have not yet had an opportunity to resolve any inconsistencies in their jurisprudence.

It is clear that Petitioner's request for certiorari is largely founded on her dissatisfaction with the lower courts' findings of fact and their application of extant law in this case. Contrary to Supreme Court Rule 10, the Petition for Writ of Certiorari asks this Court to make evidentiary rulings and reverse the factual findings made by the courts below. In support of this inappropriate request, Petitioner relies on evidence that the courts below correctly determined was inadmissible hearsay. Accordingly, the instant Petition for Writ of Certiorari should be denied in its entirety.

STATEMENT OF CASE

In this case Petitioner alleged sexual harassment, retaliation, and constructive discharge in violation of Title VII of the Civil Rights Act of 1964, as amended, and in violation of the Florida Civil Rights Act. None of Petitioner's claims survived at the district court level. On appeal, the Eleventh Circuit Court of Appeals ("Eleventh Circuit") affirmed the United States District Court for the Southern District of Florida's ("District Court") dismissal of Petitioner's claims on summary judgment.

District Court Proceedings

Respondent Adecco filed a Motion for Summary Judgment on May 1, 2003 and Motorola filed its Motion for Summary Judgment on May 5, 2003. The District Court heard oral argument on the Motions on August 22, 2003. After deliberating for seven months, the District Court granted the motions, dismissing Petitioner's claims for hostile environment harassment, retaliation, and constructive discharge in their entirety.

With respect to its decision to dismiss Petitioner's hostile environment claim, the District Court relied upon *Mendoza v. Borden Inc.*, 195 F.3d 1238, 1244 (11th Cir. 1999), setting forth the elements for a *prima facie* case[1] of hostile environment harassment. Using this standard and applying it to the facts in a light most favorable to Petitioner,[2] the District Court found that Petitioner failed to establish a *prima facie* case of sexual harassment. (R3-153-14-19). For example, many of the alleged harasser's comments, such as mentioning strip clubs to male and female coworkers alike and calling Petitioner's boyfriend a "dog," were not based on Petitioner's sex as required by *Mendoza*. Likewise, the District Court concluded that the alleged instances of touching and other conduct by the alleged harassers were not so "frequent, severe, or pervasive to constitute actionable sexual harassment. . . ." (R3-153-23). Accordingly, the District Court dismissed Petitioner's sexual harassment claim and granted summary judgment in Respondents' favor.

With respect to her retaliation claim, Petitioner argued in response to Respondents' motions for summary judgment that she had direct evidence of retaliation. Specifically, Petitioner alleged that she was told by Tom Karge, her Adecco first line supervisor, that Laila Pennington, her Motorola first line supervisor, had made it impossible for her to become a permanent Motorola employee and that Motorola would not hire her because she "complained too much." (R2-78-167-70, R2-79-268-70). Both Respondents argued that such

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1. Petitioner never asserted to the District Court that she had direct evidence of sexual harassment and, as such, the District Court applied analysis appropriate for a circumstantial case of harassment.

2. The facts that the District Court relied upon can be found in the record at R3-153-2-9.

evidence was hearsay and, therefore, not admissible, reliable or probative of Petitioner's retaliation claim. Ultimately, the District Court rejected Petitioner's direct evidence argument because it made a factual determination that Petitioner was never denied a permanent position:

> [T]here is no evidence that Bussell was denied a permanent position at Motorola. Evidence has been submitted which shows that Bussell was never eligible for and thus, was never denied a permanent position at Motorola. The fact that she may have wanted or even expected to receive a permanent position at some time in the future is irrelevant.

Thus, Petitioner's retaliation claim was dismissed by the District Court along with her other claims. (R3-153-22-23).

Appellate Court Proceedings

On appeal to the Eleventh Circuit, Petitioner asserted, by brief and in oral argument, that the District Court's decision dismissing all of her claims was erroneous. Specifically, Petitioner argued that the District Court erred when it found that the record did not support a finding that the alleged harassment was sufficiently severe or pervasive to be actionable. Petitioner further argued that the District Court erred in failing to find direct evidence of retaliation and in dismissing her constructive discharge claim.[3]

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3. Again, Petitioner never alleged she had direct evidence of sexual harassment or constructive discharge.

A three-judge panel of the Eleventh Circuit reviewed the case *de novo*. Based on its factual findings[4] and relying on *Gupta v. Florida Board of Regents* , 212 F.3d 571 (11th Cir. 2000), the three-judge panel decided, *per curiam*, that Petitioner had failed to establish a *prima facie* case of hostile environment harassment. Key to its reasoning, the panel opined that many of the comments made by the alleged harasser in the workplace were made to men and women alike, and, therefore, were not based on Petitioner's sex. The panel further noted that 10-16 alleged instances of touching by a co-worker over the period of several months were not severe or pervasive enough to constitute actionable harassment. The panel also noted that many of the cases cited by Petitioner involved harassment by a supervisor, not by a coworker, and that Petitioner failed to provide "an analogous holding that such alleged behavior is sufficiently severe or pervasive to constitute a hostile workplace sexual harassment claim." *Bussell*, 141 Fed. Appx. at 823.

Petitioner also argued to the panel that she had direct evidence to support her retaliation claim. The panel, however, affirmed that there was no error by the District Court in rejecting Petitioner's retaliation claim, stating "there is no record evidence to support Bussell suffered from an adverse action by either of the defendants." *Id.* The panel did not elaborate further, and simply concurred and affirmed the District Court's analysis and decision regarding the retaliation claim. Accordingly, in an *unpublished* decision, the panel affirmed the district court's grant of summary judgment. Finally, the Eleventh Circuit rejected Petitioner's request for rehearing *en banc*.

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4. The facts that the Eleventh Circuit found probative appear at *Bussell v. Motorola, Inc.*, 141 Fed. Appx. 819, 820-22 (11th Cir. 2005).

Petitioner then filed a petition for writ of certiorari with this Court. On October 2, 2006, the Court granted the petition for writ of certiorari vacating the judgment and remanding to the Eleventh Circuit "for further consideration in light of *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. __ (2006)." (Petition for Cert. at 3a). On remand and in another *unpublished* decision, the Eleventh Circuit acknowledged the Court's remand, reevaluated the facts in light of this Court's holding in *White*, and held that its previous decision was not affected by *White*:

> In [*White*, the Supreme Court] held that "the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace," and "the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant." . . . Neither holding applies to Bussell's appeal. The only alleged retaliatory acts of which Bussell complained were either employment related, and the alleged retaliatory acts were either not retaliatory or were not acts that "would have been materially adverse to a reasonable employee."

(Petition for Cert. at 2a). This Petition for Writ of Certiorari ensued.

REASONS FOR DENYING THE PETITION

I. THIS CASE CANNOT RESOLVE "DIRECT EVIDENCE" SPLIT

There does appear to be a split among the federal circuit courts of appeal and lower federal courts as to what constitutes "direct evidence" in the context of an employment discrimination case; however, this case is not properly postured to resolve the conflict because Petitioner's so-called "direct evidence" of retaliation is inadmissible hearsay. Furthermore, Petitioner never asserted below that she had direct evidence of constructive discharge and sexual harassment and, therefore, cannot propound such argument at this time. Moreover, the Court would have to make evidentiary rulings and overturn fact findings adverse to Petitioner to address this issue, and the Eleventh Circuit's decision is unpublished in the Federal Reporter. Thus, as explained more fully below, this case does not provide an appropriate vehicle for resolving the circuit split regarding the proper standard of "direct evidence."

A. PETITIONER'S "DIRECT EVIDENCE" IS INADMISSIBLE.

Petitioner alleges that she was told by Tom Karge, her Adecco first line supervisor, that Laila Pennington, her Motorola first line supervisor, had made it impossible for her to advance and that Respondent Motorola would not hire her permanently because of her complaints. (R2-78-167-70, R2-79-268-70). This constitutes the entire scope of Petitioner's "direct evidence" of retaliation. On it is face, this purported statement is inadmissible hearsay within hearsay. *Halloway v. Milwaukee County*, 180 F.3d 820, 825

(7th Cir. 1999) (multilevel statement was inadmissible hearsay because the employees informing the plaintiff of the alleged discriminatory statement did not act within their scope of duties in reporting the statement to the plaintiff); *Zaben v. Air Prods. & Chems., Inc.*, 129 F.3d 1453, 1455-57 (11th Cir. 1997) (comments by low-level supervisors repeating management's discriminatory comments are inadmissible hearsay), *accord Rojas v. Florida*, 285 F.3d 1339, 1343 n.3 (11th Cir. 2002); *Carden v. Westinghouse Electric Corp.*, 850 F.2d 996, 1002 (3d Cir. 1988) (same); *Cedeck v. Hamiltonian Federal Savings & Loan Association*, 551 F.2d 1136 (8th Cir. 1977) (statement by manager was inadmissible hearsay because it contained a reiteration of what an unknown person told him). Furthermore, Karge, an Adecco employee, cannot make an admission on behalf of Respondent Motorola or vice versa. *See Skillsky v. Lucky Stores, Inc.*, 893 F.2d 1088, 1092 (9th Cir. 1990) (multiple hearsay testimony about what a supervisor for one defendant was told by an executive regarding what the executive was told by another defendant was inadmissible); *Watson v. Adecco Employment Services, Inc.*, 252 F. Supp. 2d 1347, 1352-53 (M.D. Fla. 2003) (Adecco representative's purported statement to temporary workers that Adecco's client did not want them to return to work was inadmissible hearsay). Indeed, Petitioner admitted that no one at Motorola ever told her she would not become a permanent employee. (R2-78-167-70, R2-79-268-70). Therefore, the statement is inadmissible and was properly discounted by the lower courts in this case.

Even without regard to the inherent hearsay problems associated with the statement asserted above, Petitioner's retaliation claim would still fail on entirely independent grounds. First, there was no evidence in the record that Motorola or Adecco made any decision regarding a permanent

position for Petitioner with Motorola.[5] (R2-79-267-69). To the contrary, there was undisputed evidence in the record that Motorola was in the process of downsizing employees and was not hiring anyone. (R2-79-266; R2-82-62). The record further revealed that Petitioner was ineligible for permanent employment with Motorola as she had not yet been in her temporary assignment for a year.[6] (R2-82-57-58). Since Petitioner was *never* eligible for permanent employment at Motorola in the first instance, her retaliation claim that she was denied permanent employment simply does not bear scrutiny. Accordingly, the findings and conclusions of the courts below that Petitioner was not retaliated against are both legally and factually correct. *See e.g.*, *Carter v. George Washington University*, 387 F.3d 872, 883 (D.C. Cir. 2004) (plaintiff who was not qualified for position sought failed to establish *prima facie* case of retaliation); *Holtzclaw v. DSC Communications Corp.*, 255 F.3d 254, 260 (5th Cir. 2001) (same). Consequently, the conflict regarding direct evidence in employment discrimination cases cannot be resolved based on the facts of this case. When the Petition for Writ of Certiorari is view under these circumstances, Petitioner is clearly requesting that this Court grant certiorari to write an opinion in an advisory capacity, which this Court expressly loathes. *Conway v. California Adult Authority*, 396 U.S. 107, 110 (1969) ("Were we to pass upon the purely artificial and hypothetical issue tendered by the petition for certiorari we

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5. The record shows that Laila Pennington made no hiring decisions regarding Petitioner or anyone else. (R2-83-101).

6. When Petitioner left her assignment at Motorola at the end of January, 2001, she had been employed there for about eight months. She had only been there five months when she first complained of any harassment in October 2000.

would not only in effect be rendering an advisory opinion but also lending ourselves to an unjustifiable intrusion upon the time of this Court.")

B. PETITIONER WAIVED DIRECT EVIDENCE ARGUMENTS.

At page 12 of the Petition for Writ of Certiorari, Petitioner asserts that Adecco employee Kathy Brodeur stated that Petitioner "was forced out due to continuing harassment" and that Thomas Karge made a written notation that Petitioner "resigned due to continuing harassment" and that both statements constitute direct evidence of constructive discharge and sexual harassment. Because Petitioner failed to argue in the courts below that there was direct evidence, she is now precluded from raising that issue in this Court in her Petition for Writ of Certiorari. *Clingman v. Beaver*, 544 U.S. 581, 598 (2005) (Supreme Court ordinarily does not consider issues "neither raised nor decided below"); *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 168-169, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004); *Youakim v. Miller*, 425 U.S. 231, 234, 96 S. Ct. 1399, 1401, 47 L. Ed. 2d 701 (1976) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]"). As this Court has opined, "allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992). Thus, Petitioner's arguments are not properly before this Court and must be rejected. *Clingman*, 544 U.S. at 598.

Not only are these arguments procedurally barred from this Court's consideration, but there was an independently sufficient ground for dismissing this claim as well. By her own admission, Petitioner states that at the time she resigned from her assignment at Motorola on January 31, 2001, the alleged harassment had been stopped for at least a month:

> Q. Okay. So [the alleged harasser] stopped touching you around late November, early December [2000]?
>
> A. Right.

(R2-79-304-306).

> Q. And let me just, so I'm clear, because I'm trying to get it clear in my head. Is it safe to say then after mid-December, [the alleged harasser] made no other comments to you about the size of your breasts or your hair growing because of sex, from mid-December through January 31st?
>
> *****
>
> A. After December 26th, was the last time that I ever spoke to [the alleged harasser].

(R2-78-165-66). Moreover, a week prior to her resignation on January 31, 2001, Motorola removed the alleged harasser from Petitioner's department, and placed him on a completely separate floor. (R3-153-7; R2-81-29; R2-78-119-20). Accordingly, Petitioner was not in fact subject to any hostile or unlawful conditions at the time she voluntarily left her

Motorola assignment. *Oncale v. Sundower Offshore Services*, 523 U.S. 75, 80 (1998) (isolated incidents will not satisfy the severe and pervasive harassment standard); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1246 (11th Cir. 1999) (same).

Based on this undisputed record evidence, it was impossible for Petitioner to have sustained a constructive discharge claim with or without the alleged statements attributed Brodeur and Karge. Indeed, this Court has expressly held that to prevail on a claim of constructive discharge, the law requires that conditions be so unbearable that a reasonable person would feel compelled to resign. *Pennsylvania State Police v. Suders*, 124 S. Ct. 2342, 2351, 2354 (2004) (a plaintiff may only succeed on a constructive discharge claim if she demonstrates that "working conditions [were] so intolerable that a reasonable person in [her] position would have felt compelled to resign.") Petitioner's claim does not meet this standard. More specifically, since the harassment had stopped and the harasser had been removed from Petitioner's department and work space, her work place was not so intolerable that it was reasonable for her to resign at that time.[7] *Id.*

Furthermore, while Petitioner may have ceased working at the Motorola facility, she was not in fact terminated or

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7. Moreover, Petitioner's chief motivation for leaving Motorola was not that she was still experiencing harassment, but the fact that the alleged harasser had not been terminated as a result of her complaints. (R2-78-118-19). Her dissatisfaction with Motorola's business decisions simply cannot sustain a claim of constructive discharge. *See Farley v. American Cast Iron Pipe Co.*, 115 F.3d 1548, 1555 (11th Cir. 1997) ("Although [plaintiff] remains unsatisfied with [defendant's] resolution of her complaint, we have never stated . . . that a complainant in a discrimination action has a right to the remedy of her choice").

separated from her employment with Respondent Adecco. Indeed, upon Petitioner's departure from the Motorola facility, Adecco immediately found her another assignment with a different Adecco client. (R3-153-9; R2-78-170-71; R2-79-208-09; R2-82-119-20, 175, 227-28, 231-33). Thus, Petitioner remained in Adecco's employ and was not in fact "discharged," constructively or otherwise.

In sum, since Petitioner, by her own admission, was not suffering from any form of harassment at the time of leaving her assignment and by virtue of the fact that she was still employed by Adecco, it was not possible for Petitioner to sustain a viable claim for constructive discharge. No finding of direct evidence by the lower courts would have changed this outcome. Thus, this case will not, as Petitioner erroneously asserts, resolve the current conflict among the federal courts regarding direct evidence to apply in the employment discrimination context. Therefore, the Petition for Writ of Certiorari should be denied as to this issue. More importantly, Petitioner cannot fail to raise an issue in the courts below, wait to see which way the wind is blowing, and then shift gears before the appellate courts. *Cf. Taylor*, 503 U.S. at 646 ("allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system."); *James v. Watt*, 716 F.2d 71, 78 (1st Cir. 1983) (allowing amendment asserting new theory after district court dismissal "would allow plaintiffs to pursue a case to judgment and then, if they lose, to reopen the case . . . to take account of the court's decision . . . a practice which[ ] should not be sanctioned in the absence of compelling circumstances").

II. THE CIRCUITS APPLY *WHITE* UNIFORMLY

Petitioner's assertion that there is a split between the Eleventh Circuit and other courts of appeal regarding the interpretation of *White* is illusory. Rather, the Eleventh Circuit has expressly adopted this Court's analysis in *White* regarding Title VII retaliation cases:

> The Supreme Court recently addressed the adverse employment action element of a Title VII retaliation claim in [*White*]. The Court held that "the scope of Title VII's anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm" and therefore "is not limited to discriminatory actions that affect the terms and conditions of employment." *Id.* at 2412-14. Thus, an employee need not show an adverse employment action (which was this circuit's pre-*Burlington Northern* retaliatory act standard), but rather, must show that "a reasonable employee would have found the challenged action materially adverse." *Id.* at 2415. In other words, the materially adverse employment action must discourage a reasonable employee from making or supporting a charge of discrimination. *Id.*

Crosby v. Mobile County Personnel Bd., Case No. 05-17039, 2007 WL 245126 (11th Cir. Jan. 30, 2007). *See also McAdams v. Harvey*, 213 Fed. Appx. 926, 927 (11th Cir. 2007); *Arnold v. Tuskegee University*, 212 Fed. Appx. 803, 810 n.4 (11th Cir. 2006) ("the plaintiff need not show that she suffered an action affecting the terms and conditions of her employment (which was this court's standard before *Burlington*

Northern)"). Accordingly, Petitioner's claims to the contrary notwithstanding, the Eleventh Circuit, like its sister circuits, undeniably follows the standard set forth in *White* for Title VII retaliation cases. *See, e.g., Strong v. University HealthCare System, LLC*, 482 F.3d 802, 808 (5th Cir. 2007) ("*Burlington* redefined an 'adverse employment action' to include actions by an employer that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'"); *McGowan v. City of Eufala*, 472 F.3d 736, 742 (10th Cir. 2006) ("an employer's action is adverse under Title VII if it 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination," but "[t]he materiality of a claimed adverse action is to be determined objectively; 'petty slights, minor annoyances, and simple lack of good manners' will not deter 'a reasonable worker from making or supporting a charge of discrimination.'"). Therefore, the Eleventh Circuit is not at odds with other courts of appeals.

Not only is the Eleventh Circuit's test for adverse action consistent with *White* and decisions from other circuits, but the Eleventh Circuit also correctly applied *White* in the case *sub judice*. The Eleventh Circuit's holding that the alleged retaliatory acts were not retaliatory or were not acts that "would have been materially adverse to a reasonable employee" is completely consistent with this Court's opinion in *White*. As this Court opined in *White*, what constitutes an adverse action is expressed "in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. ***Context matters***." *White*, 126 S. Ct. at 2415 (emphasis added). Accordingly, not all harms constitute actionable retaliation. *Id.* ("we believe it is important to separate significant from trivial harms."). Therefore, the Eleventh Circuit's holding that none of the alleged retaliatory acts were either motivated by Petitioner's complaint of harassment and/or materially adverse is entirely consistent with *White*.

Nevertheless, Petitioner challenges the lower courts' fact findings and analysis by arguing she was retaliated against when 1) she did not become a permanent Motorola employee; 2) she was docked pay, 3) given extra work and 4) she was terminated. These contentions are wholly without merit, namely because they are not supported by the fact findings from the lower courts, and she cannot prove that these alleged acts were either motivated by her protected conduct or materially adverse. For the following reasons, the Petition for Writ of Certiorari should be denied:

Permanent Employment with Motorola

Petitioner contends that she was retaliated against when she did not become a permanent employee of Motorola after complaining about harassment. More specifically, Petitioner opines that Karge told her that Pennington told him that Motorola would not hire her "because she complained too much." The Eleventh Circuit correctly held that these allegations cannot constitute retaliation because no action, materially adverse or otherwise, ever took place. First, the purported statements Petitioner attributed to Karge constitute inadmissible hearsay.[8] In fact, Petitioner concedes that no Motorola agent ever told her she would not be hired permanently because she engaged in protected activity. (R2-79-267-69). More significantly, in this

8. *Halloway v. Milwaukee County*, 180 F.3d 820, 825 (7th Cir. 1999) (multilevel statement was inadmissible hearsay because the employees informing the plaintiff of the alleged discriminatory statement did not act within their scope of duties in reporting the statement to the plaintiff); *Zaben v. Air Prods. & Chems., Inc.*, 129 F.3d 1453, 1455-57 (11th Cir. 1997) (comments by low-level supervisors repeating management's discriminatory comments are inadmissible hearsay), *accord Rojas v. Florida*, 285 F.3d 1339, 1343 n.3 (11th Cir. 2002).

case, there is no evidence that *any decision* was made or *any action taken* with regard to Petitioner becoming a permanent Motorola employee. Accordingly, the Eleventh Circuit's grant of summary judgment is consistent with *White*, in which this court confirmed that some type of adverse action is required. *White*, 126 S. Ct. at 2415 (holding that discrimination, i.e., a "material adversity," is required to prove a *prima facie* case of retaliation); *see also McGowan v. City of Eufala*, 472 F.3d at 742 (affirming summary judgment on retaliation claim because no decision was made regarding the shift change). As no decision was made, Petitioner cannot meet the "material adversity" requirement.

The undisputed evidence shows that Motorola was in the process of downsizing its operations and was not taking on *any* permanent hires at the time of Petitioner's protected activity. (R2-79-266; R2-82-62). The record also shows that Pennington made *no hiring decisions* regarding Petitioner. (R2-83-101). Finally, Petitioner, having worked at the Motorola facility for less than a year, was *not eligible* for permanent employment at Motorola.[9] (R2-82-57-58). Thus, in the total absence of *any action* being taken for or against Petitioner regarding permanent employment with Motorola,

9. As of December 1999, a temporary worker was required to work at Motorola for at least a year before being considered for permanent employment. (R2-82-57-58). At the time Petitioner first complained of harassment in October 2000, she had only been working at the Motorola facility for five months. When she left at the end of January 2001, she had only been employed for about eight months. Therefore, Petitioner was well over four months shy of being eligible for permanent employment when she engaged in protected activity. *See, e.g., Carter v. George Washington University*, 387 F.3d 872, 883 (D.C. Cir. 2004) (plaintiff who was not qualified for position sought failed to establish *prima facie* of retaliation); *Holtzclaw v. DSC Communications Corp.*, 255 F.3d 254, 260 (5th Cir. 2001) (same).

there is not a materially adverse action for which either Respondent can be held liable.[10] As such, there is nothing inconsistent between the Eleventh Circuit's holding and this Court's decision in *White*.

Docked Pay & Extra Work

Petitioner asserts that she suffered a materially adverse action because she was "docked" pay one day when she left work early and on her last day at Motorola during which she performed no work. Petitioner's assertions are without merit. Petitioner admits that she was paid for the hours she worked on the day she left early. (R2-78-157-61). While Petitioner may have left early because she was "upset" about the harassment investigation "taking too long," there is no evidence that Petitioner was denied pay *because* she complained about harassment.[11] Being docked pay implies a

10. Again, for the Court to hold otherwise, it would have to overturn the lower courts' fact findings adverse to Petitioner.

11. Although Petitioner claims she was ill because she was upset with the investigation, Plaintiff's disagreement with Defendants' response to her complaints does not establish a violation of Title VII. *Farley v. American Cast Iron Pipe Co*,, 115 F.3d 1548, 1555 (11th Cir. 1997) ("Although [plaintiff] remains unsatisfied with [defendant's] resolution of her complaint, we have never stated . . . that a complainant in a discrimination action has a right to the remedy of her choice"). Moreover, Petitioner cannot complain about the reasonableness of the investigation if the employer's actions stop the harassment. *See Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1278 (11th Cir. 2003) ("[W]here the substantive measures taken by the employer are sufficient to address the harassing behavior, complaints about the process under which those measures are adopted ring hollow"); *see also Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287, 1304-05 (11th Cir. 2007) ("a reasonable result cures an unreasonable process. It does so because Title VII is concerned with preventing discrimination, not with perfecting process.").

basic entitlement in the first instance. Here, Petitioner was not paid *because she did not work the hours in question.* (*Id.*) There is no evidence in the record that Respondents were required to pay Petitioner for hours she did not work. If Respondents failed to pay for hours actually worked or deducted from hours worked, then, perhaps, the *Burlington* analysis would come into play. However, just as with the permanent employment issue discussed *supra*, there is no adverse action here in fact. Moreover, there is no retaliatory intent—Petitioner was not sent home because of her complaints, but *because she was "ill."* (R2-93-128). Similarly, Petitioner provided no proof, other than her own supposition, that she received more work than her counterparts. There is simply no evidence that work assignments were made based on any unlawful considerations.

Alleged Termination

Petitioner asserts that she was terminated from her Motorola assignment for complaining of harassment. This is not supported by the evidence. Adecco never terminated Petitioner from its employ. A week after Motorola completed its investigation of Petitioner's complaint *and* removed the alleged harasser from her department, Petitioner told her Adecco supervisor that she was dissatisfied with the outcome of the investigation and did not want to be assigned to Motorola any longer. Honoring her request, Adecco assigned Petitioner to work for CIGNA; however, she quit that assignment apparently because she did not like it. Thus, as indicated by the record, Adecco's act of reassigning Petitioner to another client was simply an attempt to accommodate her obvious disdain for her Motorola supervisor and coworkers. There was no other solution, as far as Adecco was concerned,

since Petitioner did not like working with Pennington and the only other option would be to work in the department to which the harasser had been moved. In the totality of the circumstances, it is disingenuous and unreasonable, to claim that such reassignment was an act of retaliation, especially when Adecco went above and beyond in helping Petitioner secure other employment opportunities, including a permanent job with United Healthcare. *See Higgins v. Gonzales*, 481 F.3d 578, 590 (8th Cir. 2007) (holding that a transfer was not materially adverse under *White* where transfer came after plaintiff's two-year term position ended and she was offered and accepted a new position).

As such, the Eleventh Circuit's decision finding that the alleged retaliatory acts were either not retaliatory or not materially adverse is consistent with the analysis in *White* and decisions by other circuits. Indeed, Petitioner's ***own*** cases cited in support of her Petition for Writ of Certiorari support the Eleventh Circuit's holding and confirm that there is ***no*** conflict among the circuits. *See Rivera-Martinez v. Commonwealth of Puerto Rico*, 2007 WL 16069 (1st Cir. 2007) (affirming summary judgment on retaliation claim because plaintiff cannot show that she was harassed after her protected activity); *Ccicsmann v. Sallada*, 2006 WL 3611729 (4th Cir. 2006) (affirming summary judgment on retaliation claim because the plaintiff failed to show any material harm); *Schmidt v. Canadian Nat'l Ry. Corp.*, 2007 WL 755171 (7th Cir. 2007) (affirming summary judgment on retaliation claim because altering the plaintiff's work schedule to make it start and end one hour later, forcing him to use vacation time, and changing his duties were not materially adverse under the particular circumstances of the case); and *McGowan v. City of Eufala*, 472 F.3d at 742 (affirming summary judgment on retaliation claim because

the denial of a shift change and harassment failed the test of materiality). Accordingly, there is no split among the circuits warranting review by this Court. *See also Higgins*, 481 F.3d at 590 (holding that lack of mentoring and a transfer were not materially adverse under *White* where plaintiff was not negatively impacted by lack of supervision and transfer came after her two-year term position ended and she accepted a new position with the employer); *Strong*, 482 F.3d at 809 (holding that *White* did not affect analysis of retaliation claim because plaintiff did not prove but for causation). Therefore, the Petition for a Writ of Certiorari should be denied.

CONCLUSION

As demonstrated above, this case is not properly postured to resolve the apparent conflict among the federal courts as to what standard of direct evidence to apply in the context of employment discrimination cases. Furthermore, the Eleventh Circuit complied with this Court's remand and Petitioner has otherwise failed to present any other conflict or compelling legal question warranting this Court's consideration. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CASE RECORDS AND BRIEFS

No. 06-1499

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In The

Supreme Court of the United States

MEGHAN BUSSELL,

Petitioner,

v.

MOTOROLA, INC. AND ADECCO EMPLOYMENT SERVICES, INC.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF MOTOROLA, INC. IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should the Court use this case to define "direct evidence" in the context of a Title VII retaliation claim even though this issue was not addressed by the courts below and undisputed facts not disclosed in the petition show that petitioner has no direct evidence under any definition of that term?

2. Should the Court exercise its certiorari jurisdiction to review an unpublished opinion holding that petitioner's "distort[ed]" and "exaggerate[d]" presentation of the record fails to support her retaliation claims under the standard adopted in *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006), which the court of appeals correctly articulated?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Motorola, Inc. ("Motorola") states that it is a publicly held corporation, has no parent company, and no publicly held company owns 10% or more of its stock.

All parties to the appeal in the Eleventh Circuit are listed in the caption of the petition.

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BRIEF OF MOTOROLA, INC. IN OPPOSITION

This case is not a good vehicle for addressing the elements of a Title VII claim. The first issue raised by Petitioner Meghan Bussell ("Bussell") – the meaning of "direct evidence" – was not addressed by the courts below. Further, this issue cannot affect the outcome of this case because undisputed facts not disclosed in the petition show that petitioner has no direct evidence under any definition of that term. The second issue boils down to whether the Eleventh Circuit – after properly stating the standard for retaliation claims – erroneously held in an unpublished opinion that Bussell's "distort[ed]" and "exaggerate[d]" presentation of the record fails to support her claims under this Court's decision in *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006). This issue does not warrant review on a writ of certiorari because it is fact-based and does not present any new or errant ruling of law.

COUNTERSTATEMENT OF THE CASE

The Eleventh Circuit found that Bussell's appellate brief "represents a misreading of the record and either distorts or exaggerates the evidence and testimony in the record." *Bussell v. Motorola, Inc.*, 141 Fed. Appx. 819, 822 (11th Cir. 2005). Bussell's present petition for writ of certiorari suffers from similar deficiencies. Pursuant to Supreme Court Rule 15.2, therefore, Respondent Motorola, Inc. ("Motorola") submits the following counterstatement of the case.

1. This Court remanded for consideration of Bussell's retaliation claims

The petition seeks review of the Eleventh Circuit's decision following remand of the case for further consideration in light of *Burlington N. & S. F.R. Co. v. White*, 126 S. Ct. 2405 (2006), which clarified the scope of Title VII's anti-retaliation provision as follows:

> We conclude that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant.

Burlington, 126 S. Ct. at 2409.

Because *Burlington* addressed only retaliation claims, the remand affected only Bussell's retaliation claims and only Bussell's retaliation claims are at issue now.

2. On remand, the Eleventh Circuit affirmed because the record did not reflect retaliatory acts that would have been materially adverse to a reasonable employee

The Eleventh Circuit's articulation of the controlling standard in its remand decision tracks the *Burlington* holding:

> In *Burlington Northern*, the Supreme Court considered the scope of the anti-retaliation provision of Title VII, 42 U.S.C. § 2000e-3(a). The Court held that "the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the work-place," and "the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant."

Petition at 2a.

After further briefing and consideration, the Eleventh Circuit found that the *Burlington* decision did not affect its prior opinion for two reasons. First, the clarification that Title VII's anti-retaliation provision reaches non-work-place conduct is immaterial to this case because Bussell challenged only employment-related acts. *Id.* Second, the record contained no evidence of retaliatory acts that "'would have been materially adverse to a reasonable employee.'" *Id.* Accordingly, the Eleventh Circuit reinstated its opinion affirming summary judgment against Bussell because the evidence adduced by Bussell failed to satisfy the *Burlington* standard. *Id.* Like *Burlington*, the Eleventh Circuit's remand opinion addressed only retaliation claims. *Id.*

3. Much of Bussell's statement of the case is not relevant

Bussell's statement of the case relates largely to her claim that a non-supervisory co-worker, Bob Render, subjected her to sexual harassment. *See* petition at 4-7. Bussell's lengthy and graphic account of Render's behavior, however, is not relevant because only Bussell's retaliation claims are at issue, not the alleged sexual harassment itself.

Also irrelevant are Motorola's incident reports. *See id.* at 8-9. It is undisputed that Motorola investigated Bussell's claims and disciplined Render for violating corporate policies. *See id.*; *see also* R2-97-100) (deposition of Martha Jaramillo explaining that Motorola transferred Render so Bussell could "be comfortable in the work place"). This evidence, however, shows accommodation of Bussell, not retaliation against her. As noted by the Eleventh Circuit, Bussell testified that no sexual harassment occurred after she complained to Motorola's Human Resource Administrator, Marcy Covington. *Bussell*, 141 Fed. Appx. at 822.

Although Bussell's description of Motorola's findings is not relevant to her petition, it nonetheless needs correcting to ensure an accurate portrayal of background facts. Contrary to Bussell's suggestion, Motorola did not find that Bussell was subjected to "sexual" harassment. *See* petition at 12. Motorola interviewed Bussell's co-workers, but – despite close

working quarters at the plant – none corroborated Bussell's claims regarding the alleged tattoo incident or other touchings. R2-110-283. Bussell admitted that Render directed his crude remarks to everyone – men and women alike. R1-109-52. Thus, while Motorola found that Render's boorish conduct created a hostile work environment, it concluded that there was no "sexual" harassment. R2-95-98, 121. Covington's contemporaneous notes sum up her findings as follows:

> After speaking with several associates in the department I did not find that Meghan had been sexually harassed. I did find that there has been abusive language in the department.

R2-95-99.

4. Bussell's discussion "distorts or exaggerates" the record

Bussell says that she suffered four different forms of adverse employment action after complaining of sexual harassment: (1) "not being made a permanent Motorola employee"; (2) "being constructively discharged"; (3) "having her pay docked"; and (4) "being given 3-5 times more work." Petition at 20. A review of the transcript pages cited by Bussell, however, reveals that her discussion of the retaliation evidence distorts the record.

"Not Being Made a Permanent Motorola Employee"

The petition asserts that "Bussell's supervisor (Karge) told her she would not be given a permanent position with increased pay and benefits because she 'complained too much' about sexual harassment." Petition at i. Karge, however, was not a Motorola employee. He worked at Adecco Employment Services, Inc. ("Adecco"), the staffing company that found temporary employees for Motorola. *See Bussell*, 141 Fed. Appx. at 820. Karge had no role in deciding whether or not Motorola would hire Bussell as a permanent employee.

The petition omits Bussell's testimony that no one from the decision-maker – Motorola – told her that she would not be hired as a permanent employee because of her complaints:

> Q. [Did you] talk to Laila [Pennington] or anyone at Motorola to say, is it true that I am not eligible for a [*sic*] Motorola employment?
>
> A. No. . . .
>
> Q. You said Tom [Karge] told you you would not become a permanent employee?
>
> A. Tom told me and Russ this. . . . he told me and Russ that it was because I was complaining and because Russ was my boyfriend.

> Q. Did anyone employed by Motorola tell you that?
>
> A. No.

R2-109-168; R2-110-268.

Further, as noted by the district court, the record establishes that "Bussell was never eligible for and thus was never denied a permanent position at Motorola." R3-153-22. At the time Bussell left Motorola, a temporary employee could not be considered for full-time employment until after twelve months of service. R2-82-58-59. Bussell, however, worked as a temporary employee for less than nine months. R2-109-25, 163.

The petition cites to a passage from Bussell's deposition stating that Adecco – not Motorola – told Bussell she would have the opportunity to become a permanent Motorola employee after six months. Petition at 22-23; *see also* R2-109-183. The petition, however, fails to mention that Bussell signed a document stating that "Adecco does not guarantee that full-time employment will be available at the end of the six-month assignment." R2-109-183.

The petition also omits Bussell's testimony that at the time other temporary employees who were supposed to become permanent were being laid-off. R2-110-267-268.

> Q. So, people who were already in the pipeline process to become Motorolans were told sorry, we have a lay off?

A. Yes. Not all of them. . . .

Q. How many actually became Motorolans?

A. Not much. Like I said, very few, like only a couple.

R2-110-268.

"Being Constructively Discharged"

As an example of direct evidence, the petition states that "Karge made a notation in Bussell's termination documents that she '[r]esigned due to continuing harassment.'" Petition at i; *see also id.* at 12, 23. The petition says that "Karge testified that these conclusions were his own, and he agrees with them." *Id.* at 23. The transcript pages cited by Bussell as support for this statement, however, show that Karge's journal entry merely reflected what Bussell had told him:

Q. [Referring to a journal entry dated February 2, 2001,] it says, "Resigned due to continuing harassment and being made to feel uncomfortable. Because the sexual harassment case was so drawn out and not a lot of support in her department which was causing her to get ill. She finally ended her assignment on-site at Motorola to take another position with Adecco." Who put in that entry?

A. I entered that.

Q. Did Meghan help you with that entry?

A. It was all based on – actually help me, no. This is all based on the whole situation and I put that in there.

Q. Then there is an entry on January 29th, "The sexual harassment case is completed, determined after speaking to all the witnesses that Bob [Render] does speak loud and says vulgar things – [A. Hm, hm.] – but none of them heard the things he was saying to Meghan. Moved Bob out of Laila's [Pennington's] department to resolve the issue and to take the sexual harassment class with the whole department." Who said that, who put that in?

A. I put everything that you're looking at there in my name to the left over there.

Q. And on each of these entries were you telling the truth?

A. The way things are put in we question the person and this is how she felt, so basing how she felt is the reason I look at. I mean, we have different reasons to pick from and she felt it was a hostile environment so that's what I put. . . .

Q. Where does it say she felt that?

A. Right here, between her and I.

R2-112-173-174.

According to Bussell, "[t]here is additional direct evidence of constructive discharge, because Kathy Brodeur (one of Adecco's managers and Karge's supervisor) testified that Bussell did not quit. (R2-99-92)." *Id.* at 23. Bussell then says that "Brodeur believes that Bussell was essentially forced out of her employment 'due to continuing harassment.' (R2-99-168)." *Id.* A review of the transcript pages cited by Bussell, however, shows that Brodeur's testimony actually compels the opposite conclusion:

> Q. Did you ever have any discussions with Meghan just before the time she left?
>
> A. I believe we spoke – not directly, the communication was a lot with Tom Karge but for reinforcement and to put her in a comfortable working condition we did explain that she – if she was interested she could – we would contact the Fort Lauderdale office or another office for another assignment. . . .
>
> Q. So, that conversation about referring her to the Fort Lauderdale office, was that the day that Meghan quit?
>
> A. I don't think she – well, she didn't quit. I believe, from what I could recall, she went on an interview with the new client's assignment, went on the interview first and then accepted the position, if I can recall the steps. I don't think she came in and quit, terminated her assignment at Motorola first and then went to the Fort Lauderdale office.

As I remember it, I think she went on the interview first. . . .

Q. [Referring to Karge's journal notes,] it says, "Resigned due to continuing harassment and being made to feel uncomfortable because the sexual harassment case was so drawn out and not a lot of support in her department which was causing her to get ill. She finally ended her assignment on site at Motorola to take another position with Adecco." Did you ever see that statement in her file?

A. I didn't read the – I mean, we had so many people coming and going I didn't read this particular one, no.

Q. Is this statement consistent with what you thought happened?

A. No. . . .

Q. Did you know that she resigned due to continuing harassment?

Mr. Loffredo: Object to form.

The Witness: Yeah. No, I wasn't – I knew of her going for interviews for a position elsewhere so – not due to continue being harassed, no.

R2-99-91-92, 167-168.

"Having Her Pay Docked"

In an attempt to buttress her retaliation claim, Bussell says that "Motorola admitted on page 48 in its Brief that Bussell was docked pay." Petition at 10; *see also id.* at 20. It is undisputed, however, that Adecco – not Motorola – was responsible for paying Bussell. R2-110-266. Further, the page cited by Bussell stresses that "Bussell admits that, on the one occasion she was sent home by Motorola, it was *with* pay. [R2-78-161]." While Motorola pointed out that Bussell claimed that Adecco – not Motorola – sent her home without pay on the day that she resigned and on one other day when she left work early, Adecco has made clear that it had no obligation to pay Bussell for time-not-worked because Bussell was only a temporary employee. *See* Brief of Appellee Adecco Employment Servcs., Inc. at 39, *Bussell v. Motorola, Inc.*, 141 Fed. Appx. 819 (11th Cir. 2005) (No. 04-12120).

"Being Given 3-5 Times More Work"

Bussell claims that she "was given more than 3-5 times the work as similarly situated co-workers were given." Petition at 10. She was upset because three boxes of phones were "dumped" on her desk for her "to take care of." R2-110-293. She also was asked to perform some quality control functions in which she reviewed the work of other assemblers. R2-110-260-268. Bussell, however, testified that she was flattered by this work, and was able to get assistance with it from "one of the assemblers or one of the repair girls."

R2-110-262, 264. She was told that she was being asked to do this work because she was a good employee. R2-110-217, 262-264. Bussell thought that she was in fact considered a good employee by Motorola management.

> Q. Do you have any reason to believe that Johnny was lieing [*sic*] to you when he said Laila [Pennington] asked you to do that work through him, because she thought you were doing a good job?
>
> A. No, none.

R2-110-264.

REASONS FOR DENYING THE PETITION

1. This case is not a good vehicle for deciding the first question – the definition of direct evidence – because neither the rulings nor record below raise this issue

Bussell's first question asks this Court to address various definitions of direct evidence used by circuit courts in employment discrimination cases. This case is not a good vehicle for defining direct evidence, however, because neither the rulings below nor the record raise this issue. *E.g., United States v. Williams*, 504 U.S. 36, 41, 112 S. Ct. 1735, 1738-39 (1992); *City of Springfield v. Kibbe*, 480 U.S. 257, 258-59, 107 S. Ct. 1114, 1115 (1987).

In the district court, Bussell argued that she had direct evidence of retaliation because, according to

her, Karge, her Adecco supervisor, had told her that her Motorola supervisor, Pennington, had told him that Bussell would not get a permanent Motorola position because she complained too much. Motorola's principal response was that the alleged statement was inadmissible as double hearsay. But, the district court never determined whether the statement was either hearsay or direct evidence. Instead, it held that there was no adverse employment action as necessary to prove a Title VII violation because Bussell voluntarily resigned before being eligible for the permanent position at Motorola. R3-153-22. The court of appeals simply affirmed the summary judgment "for the reasons set forth in the district court's order." *Bussell*, 141 Fed. Appx. at 823. Accordingly, there is no ruling on the meaning of direct evidence for this Court to review here.

Further, this issue cannot affect the outcome in this case because Bussell has no direct evidence under any definition of that term. Regardless of any debate over the meaning of direct evidence, Bussell notes that "courts agree on what is *not* direct evidence – *e.g.*, statements by non-decisionmakers, statements by decisionmakers unrelated to the contested employment decision, and other 'stray remarks.'" Petition at 16 (quoting *Fakete v. Aetna, Inc.*, 308 F.3d 335, 338 (3d Cir. 2002)). As explained by Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins*:

> [S]tray remarks in the workplace ... cannot justify requiring the employer to prove that its hiring or promotional decisions

> were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard.

Price Waterhouse v. Hopkins, 490 U.S. 228, 277-78 (1989) (O'Connor, J., concurring); *see also Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487, 491 (7th Cir. 2007); *Peyton v. Kellermeyer Co.*, 115 Fed. Appx. 825, 830 (6th Cir. 2004).

The four statements cited by Bussell as direct evidence are precisely what courts agree "is *not* direct evidence" of retaliation or retaliatory constructive discharge by Motorola:

1. Bussell's statement that Karge – an Adecco employee – told her that Pennington told him that Motorola would not give Bussell a permanent position, for which she was not yet eligible, because she complained too much;

2. A journal kept by Karge reflecting that Bussell told him that she was taking a new job that Adecco found for her because she felt that there was a hostile work environment at Motorola;

3. Testimony from Brodeur *denying* that Bussell "was forced out due to continuing harassment," and clarifying that Bussell interviewed for her new job before quitting her temporary position at Motorola; and

4. An incident report showing that Motorola investigated Bussell's claims and disciplined Render, who was not in a supervisory position, because his crude comments violated company policy.

The first statement is not direct (or circumstantial) evidence because it is unrelated to any employment decision. *Id.* Bussell never was eligible for a permanent position at Motorola, and no employment decision was pending or imminent when she left. Indeed, the record suggests that no new permanent positions were available when Bussell resigned. Bussell admitted that, due to downsizing, Motorola was laying-off employees who were supposed to transfer from temporary to permanent status.

Further, the first statement does not qualify as direct (or circumstantial) evidence because it was not made by a decision-maker. *Id.* Karge was not a Motorola employee, and nothing in the record suggests that Pennington had authority to make decisions on permanent hires. Of course, this statement also fails to support Bussell's claim because it is inadmissible hearsay. *See, e.g., Zaben v. Am. Prods. & Chems., Inc.*, 129 F.3d 1453 (11th Cir. 1997).

The second statement, the Karge journal entry, is not direct (or circumstantial) evidence because it reflects only Bussell's view, not that of her employer. Again, this is not a statement by a decision-maker. The third statement, Brodeur's testimony, actually

contradicts Bussell's claims and shows she suffered no harm. Similarly, the last item is not direct or circumstantial evidence of retaliation or constructive discharge. It shows only that Motorola responded to Bussell's complaints by investigating and disciplining Render. Bussell admitted that Render never bothered her again after Motorola began its investigation.

In sum, granting review on the first question would waste the Court's resources because the question presented is not properly framed by the decisions below and is not relevant to the record in this case.

2. The second question – whether the Eleventh Circuit misapplied a correct statement of the *Burlington* standard to Bussell's distorted presentation of the record – does not satisfy the criteria for certiorari jurisdiction

Bussell has not identified a split in the circuits on the *Burlington* holding. She points out that the post-*Burlington* decisions from other circuits are consistent. *See* petition at 26-27. Her claim that the Eleventh Circuit "eschews" the new *Burlington* standard ignores the language of the remand opinion – which quotes *Burlington* – and distorts the record. The Eleventh Circuit rejected Bussell's retaliation claims because Bussell failed to adduce evidence of retaliation "that 'would have been materially adverse to a reasonable employee.'" Petition at 2a. This holding is, on its face, consistent with the *Burlington*

rule. Moreover, the opinion below cannot create a circuit split because it is unpublished and thus does not represent the law of the Eleventh Circuit. *See* Eleventh Cir. Rule 36-2.

Bussell's second argument, therefore, boils down to her view that the unpublished opinion below misapplied a properly stated rule to the particular facts of this case. This issue, however, does not satisfy the criteria for certiorari jurisdiction. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10. Certiorari is particularly inappropriate here because it would require this Court to second-guess the Eleventh Circuit's conclusion – after a thorough *de novo* review – that Bussell's statement of the case "represents a misreading of the record and either distorts or exaggerates the evidence and testimony in the record." *Bussell*, 141 Fed. Appx. at 822.

In any event, the decision below is correct. In *Burlington*, the Court made clear that "[t]he anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm." *Burlington*, 126 S. Ct. at 2414. Such harm must be "materially adverse" because "Title VII . . . does not set forth 'a general civility code for the American workplace.'" *Id.* at 2415 (quoting *Oncale v. Sundowner Offshore Servcs., Inc.*, 523 U.S. 75, 80 (1998)). It prohibits "only those" retaliatory acts "that would have been materially adverse to a reasonable

employee." *Id.* at 2409. Further, the *Burlington* standard "does *not* require a reviewing court or jury to consider 'the nature of the discrimination that led to the filing of the charge.' . . . Rather, the standard is tied to the challenged retaliatory act." *Id.* at 2416 (emphasis original).

After this Court remanded the case for consideration in light of *Burlington*, the Eleventh Circuit required further briefing from all parties. In its supplemental brief, Motorola pointed out that Bussell never alleged any non-workplace retaliation. The *Burlington* holding that Title VII applies to non-workplace retaliation, therefore, has no impact on this case. Further, the objective standard adopted in *Burlington* does not undermine the Eleventh Circuit's previous rejection of Bussell's employment-related retaliation claim because this is precisely the standard advocated by Motorola in its initial briefing: "A plaintiff must demonstrate that a reasonable person in her position would view the employment action in question as adverse; the standard is objective." Answer Brief of Motorola at 45 (citations omitted), *Bussell* (No. 04-12120); *see also Cotton v. Cracker Barrel Old Country Store*, 434 F.3d 1227, 1234 (11th Cir. 2006) (instructing, in pre-*Burlington* case, that the challenged action "'must be materially adverse as viewed by a reasonable person in the circumstances'"). As found by the Eleventh Circuit in its initial opinion and on remand, the record in this case fails to satisfy this standard.

The Supreme Court upheld the jury award on the retaliation claim in *Burlington* because the plaintiff,

White, presented proof that her employer first demoted and then wrongfully suspended her without pay as a result of her discrimination charge. In particular, White was reassigned from forklift duty, which was deemed to be a less arduous and more prestigious position, to standard track laborer tasks. *Id.* at 2417. She later was wrongfully suspended without pay for 37 days. *Id.* The record documented the harm caused by this protracted loss of income. *Id.* Bussell, however, has not presented comparable evidence of material adversity from the alleged retaliation.

Because Bussell was never eligible for a permanent position before she left Motorola, Karge's alleged statement that Bussell would never be a permanent employee reflects only a future possibility, not actual adverse action as required by *Burlington*. *See Burlington*, 126 S. Ct. at 2424; *see also Dar Dar v. Associated Outdoor Club, Inc.*, 201 Fed. Appx. 718, 723 n.3 (11th Cir. 2006) (noting that a complaint log is not actionable under *Burlington* unless it is used as the basis for disciplining or terminating the employee); *cf. Dick v. Phone Directories Co., Inc.*, 397 F.3d 1256, 1267-1269 (10th Cir. 2005) (affirming conclusion that an unrealized threat did not constitute adverse action).

Karge's journal entry shows that Bussell suffered no material adversity as required to prove a retaliation claim under *Burlington* because Bussell accepted another job that Karge found for her before she left her temporary position at Motorola. *See* R3-153-22.

As found by the district court and the Eleventh Circuit, this is not evidence of constructive discharge.

The "dock-in-pay" issue is not relevant to the summary judgment in Motorola's favor because Bussell has admitted that "[her] paychecks were from Adecco," R2-79-266, and that Motorola never sent her home without pay. R2-78-161. Further, Adecco's failure to pay Bussell for hours-not-worked on the day she resigned and on one other day when she went home early is not actionable retaliation under *Burlington* because there is no evidence that other temporary employees were paid for time-not-worked under similar circumstances.

Bussell says that her Motorola supervisor, Pennington, yelled at her and called her a liar and a baby. Petition at 21. Bussell, however, testified that she did not consider this conduct to be retaliatory. R2-110-292-294. Instead, Bussell thought that Pennington retaliated against her by giving her more work. *Id.* at 293. She testified that, after complaining about Render, "right after that, I'm getting all this work, so that's what I mean by retaliatory. I'm not saying because she called me a baby she's retaliating against me." *Id.* Moreover, Bussell omitted name-calling from her list of alleged retaliatory acts in previous filings. *See* petition at 20; *see also Burlington*, 126 S. Ct. at 2415 (noting that "Title VII . . . does not set forth 'a general civility code for the American workplace' ").

Although Bussell thought that Pennington increased her workload, an employee's subjective

view of workload fluctuations does not show materially adverse action as a matter of law – particularly where other employees are asked to help with the work. *See Fane v. Locke Reynolds, LLP*, 480 F.3d 534, 539 (7th Cir. 2007); *Jones v. Barnhart*, 349 F.3d 1260, 1269-70 (10th Cir. 2003); *Tran v. The Boeing Company*, 190 Fed. Appx. 929, 934 n.3 (11th Cir. 2006). Further, this claim fails because there is no evidence of pretext to rebut the uncontroverted proof that Motorola assigned Bussell this work because she was a good employee. *See Fane*, 480 F.3d at 539; *Deters v. Rock-Tenn Co., Inc.*, No. 06-4356, 2007 WL 2404515 at *13-14 (6th Cir. Aug. 22, 2007); *Beard v. 84 Lumber Co.*, 206 Fed. Appx. 852, 855 (11th Cir. 2006).

Thus, unlike the employee in *Burlington* who was demoted from a position of prestige to arduous manual tasks, Bussell's new assignments involved an added degree of responsibility and reflected her employer's confidence in her abilities. R2-79-189, 262, 264. Unlike the employee in *Burlington* who lost over a month's pay, Bussell was never eligible for the economic benefits that she says she lost as a result of complaining. Unlike the scenario in *Burlington*, Motorola and Adecco responded to Bussell's complaints and accommodated her – first by transferring and disciplining Render and then by providing her with other employment opportunities. The record in this case is devoid of retaliatory acts that would be materially adverse to a reasonable employee.

Accordingly, the second question does not warrant the exercise of this Court's certiorari jurisdiction

because: (1) there is no split in the circuits on the *Burlington* standard; (2) the asserted error relates only to factual findings; and (3) the Eleventh Circuit's decision on remand is correct.

CONCLUSION

The Court should deny the petition for writ of certiorari.

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No. 06-1499

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In The

Supreme Court of the United States

MEGHAN BUSSELL,

Petitioner,

v.

MOTOROLA, INC., a Delaware corporation
and ADECCO EMPLOYMENT SERVICES, INC.,
a Delaware corporation,

Respondents.

On Petition For Writ Of Certiorari
To The Eleventh Circuit Court Of Appeals

REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO COUNTERSTATEMENTS OF CASE

Defendant Motorola argues that because the Court of Appeals stated that Bussell's position "represents a misreading of the record and either distorts or exaggerates the evidence and testimony in the record" (*Motorola's Response* at 1), this Court should not grant *certiorari* review. No court below ever identified *any* of the alleged distortions or misrepresentations. In fact, Bussell's Response to Defendants' Motions for Summary Judgment and her Briefs in the Court of Appeals set forth block quoted evidence, much like her statement of the case in her Petition for Certiorari. Those long quotes of record evidence taken from depositions have not been distorted or misrepresented in any way. Rather, it is the Defendants' Statement of the Cases in their Response Briefs that contain distortions and misrepresentations, and they do not contain a summary of the facts of the case in the light most favorable to Bussell, which is the required standard under Rule 56. Every factual statement made by Bussell to the district court and to the Court of Appeals, to the extent that it was not a block quote, was supported by a correct citation to record evidence.

An example of a misrepresentation of the record by Defendant Motorola is its statement that "nothing in the record suggests that Pennington had authority to make decisions on permanent hires." (*Motorola's Response* at 16). Contrary to Motorola's representation, Karge represented to Bussell that Pennington did in fact have the authority to disallow Bussell from becoming a permanent Motorola employee, because after Bussell complained to Karge about having her pants pulled down by Render, Karge told Bussell that she was "no longer eligible to be made [a] Motorolin [a permanent Motorola employee] because Laila [Pennington] has made it impossible for [you]." (R2-109-68). This is just one example. Peppered throughout the Defendants' Briefs are significant stretches of the record evidence, including Defendants drawing inferences from facts in their favor, rather than

in Bussell's favor (the non-moving party) as required by Rule 56. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456 (1992).

An example of a misrepresentation of the record by Adecco is its assertion that Bussell "relies on [direct] evidence that the courts below correctly determined was inadmissible hearsay." (*Adecco's Response* at 2). The courts below, although the issue of whether the direct evidence was inadmissible hearsay or not was presented to them, did not make a finding one way or the other on that issue, and even Motorola agrees, as it stated in its Response, that "the district court never determined whether the statement [the direct evidence] was either hearsay or direct evidence." (*Motorola's Response* at 14).

Another example of a misrepresentation of the record by Adecco is its assertion that Bussell was never improperly docked pay. (*Adecco's Response* at 18-19). Even Motorola admitted in its Response Brief to the Eleventh Circuit that Bussell had her pay docked. (*Motorola's Response Brief to Direct Appeal to Eleventh Circuit* at 48) (citing R2-78-159-61).

REASONS FOR GRANTING THE WRIT

I. CONCERNING THE QUESTION PRESENTED PERTAINING TO DIRECT EVIDENCE, (1) BUSSELL PRESENTED HER DIRECT EVIDENCE ARGUMENTS BELOW; (2) THE DIRECT EVIDENCE IS NOT INADMISSIBLE HEARSAY, AND (3) THERE IS AN ADMITTED SPLIT IN THE CIRCUIT COURTS OF APPEALS REGARDING WHAT CONSTITUTES "DIRECT EVIDENCE" AND ITS USE AND EFFECTS IN AN EMPLOYMENT CASE.

Initially, the Court should note that Respondent Adecco has admitted that there is a split in the circuits concerning the standard for direct evidence in an employment case, and the effect of such a finding on the case. (*Adecco Brief* at 7).

There is direct evidence of sexual harassment, because both Respondents found that Bussell was sexually harassed, and there is evidence that she was retaliated against because she complained of sexual harassment; such arguments were clearly raised below, as set forth below. Covington conceded that the offensive comments that Bussell's co-workers told her Render was uttering created a hostile work environment. (*See Petition for Certiorari* at 8) (quoting Covington's findings which state that Render's "admitted" "inappropriate, foul and abusive language" "contribut[ed] to a hostile/intimidating work environment and is in violation of Motorola's Policy").

Motorola's Statement to the EEOC stated that "Render was given an incident warning and put on probation for a one year period with the understanding that any further violations of the sexual harassment policy would result in his immediate termination." (R2-116-180-81). Martha Jaramillo, a high-level management of official of Motorola, who was the ultimate decision-maker concerning the discipline and resolution arising out of Bussell's complaints, testified that Render "created a hostile work environment discussing strip clubs and making comments and unwanted words." (R2-97-100).

In Karge's findings concerning the sexual harassment allegations, Karge found, on January 29, 2001, as follows: "hostile work environment Reason: Work Conditions was the reason. Resigned due to continuing harassment, and being made to feel uncomfortable. Because the sexual harassment case was so drawn out and not alot [sic] of support in her dept which was causing her to get ill. . . ." (R2-93-Ex.21) (dated Feb. 2 and 15, 2001). Karge testified that these conclusions were his own, and he agrees with them (R2-112-173-74), which is contrary to Motorola's representation that Karge's journal entry was simply Bussell's view. (*Motorola's Brief* at 16). Further, Adecco argues that Bussell was sent home because she was ill, which had nothing to do with her complaints of harassment (*Adecco's Response* at 19), but the above statement from Karge's journal clearly shows that Bussell was becoming ill *because of* the harassment, and the block-quote on page 11 of Motorola's Brief clearly sets forth that Bussell was becoming ill because of the harassment.

Direct evidence of retaliation exists, because Karge told Bussell that she was not going to be made a permanent Motorola employee (a "Motorolan") "because [she] complained too much." (R2-109-159). On pages 268 and 168, Bussell testified that "Karge told [Bussell] . . . that [she would not be a permanent Motorola employee] because she was complaining. . . ." (R2-110-268, 168).

There is direct evidence of constructive discharge, because Kathy Brodeur (one of Adecco's managers) testified that Bussell did not quit. (R2-99-92). Brodeur answered "yeah" when asked if Bussell was forced out of her employment "due to continuing harassment." (R2-99-168).

These arguments (the foregoing five paragraphs) were clearly raised below. See *Bussell's Statement of Disputed Facts in Opposition to Defendants' Motions for Summary Judgment* (pp. 13, 15, 16, 127, 18; ¶¶ 88, 114-16, 120, 125-27, 135), and *Memorandum of Law in Opposition to Summary Judgment* (pp. 2, 8, 13-16, 17, and 20), and (*Eleventh Circuit Brief* at pp. 26, 30, 31-32, 33, and 35). Contrary to the Defendants' assertions that this case does not present an appropriate vehicle for addressing the direct-evidence circuit conflict, these various different forms of direct evidence present a virtually model case, because they give the Court various factual scenarios in which to elaborate concerning what evidence is truly direct evidence, and why, and what effect that evidence has on the case. Defendants both made the arguments (that the evidence was not argued below) previously, and this Court granted *certiorari* the first time the case was before it.

The comments (direct evidence) are not inadmissible hearsay or double hearsay, but rather clearly admissions by a party-opponent, because they come from management personnel discussing employment decisions in the course and scope of their employment. Fed. R. Evid. 801(d)(2).

A former Fifth Circuit case is directly on point here, and requires the conclusion that the evidence in question is not hearsay. In *Kingsley v. Baker/Beech-Nut Corp.*, 546 F.2d 1136, 1141 (5th Cir. 1977), the plaintiff-employee's supervisor (Jackson) made a comment over the telephone

that was overheard by another employee. The employee's testimony (about what Jackson said) was held to be non-hearsay (under Rule 801(d)(2)(C)), as follows:

> Trial evidence established that Jackson [the main protagonist] was Kingsley's [the plaintiff] superior within the Baker/Beech-Nut Sales Division, that Jackson was responsible for appraising Kingsley's work, and that Jackson reported these evaluations to his superiors who in turn acted upon them. It is clear, therefore, that Jackson had the authority from Baker/Beech-Nut to make the statements quoted from his telephone conversation. . . . Accordingly, Jackson's statements are not excludable hearsay and are admissible.

Kingsley v. Baker/Beech-Nut Corp., 546 F.2d 1136, 1141 (5th Cir. 1977).

Adecco seizes on the fact that Bussell does not claim that she heard the alleged retaliatory statement from Pennington directly. It does not matter, because both statements are non-hearsay, as they constitute admissions by a party-opponent. As stated, management officials acting in their representative capacities made these statements. Karge, Bussell's supervisor, was instructing Bussell as to what employment decision Pennington decided to make concerning Bussell (not allowing her to be a permanent Motorola employee). The entire context of the conversation was Karge informing Bussell how Pennington was going to retaliate against her. Karge, as Bussell's supervisor, was the appropriate person to tell Bussell of Pennington's decision.

In this case, both prongs of hearsay clearly fall into Rule 801(d)(2)(A)'s scope, because both Karge and Pennington were managing agents. Pennington specifically admitted that she was a manager, and Karge is unquestionably a managing agent, because he supervised 400-500 people at the Motorola job site for Adecco. Accordingly, Bussell's testimony that Karge told her that Pennington told him that Bussell was not going to be made a permanent employee because she complained too much about harassment and retaliation is not hearsay, because neither

prong of the two prongs is hearsay, because both prongs consist of statements uttered by managers.

Likewise, *Zaben* does not require the conclusion that Bussell's statement is hearsay. In *Zaben*, two low-level employees heard rumors that unidentified management officials had said that they wanted to get rid of the older workers. *Zaben*, 129 F.3d at 1455. The low-level employees had nothing to do with the employment decision which affected Mr. Zaben. The court found that Zaben's testimony about what the two low-level employees told him "present[ed] a double hearsay problem because the declarants seemed to be repeating what other unidentified, declarants had told them." *Id.* at 1455. Mr. Zaben could not establish a hearsay exception, because he could not identify the declarants. Moreover, the court noted that Mr. Zaben ran into another hearsay problem, that being that the two low-level supervisors had no involvement or authority over the employment decisions in question, and therefore were really only repeating rumors.

The *Zaben* case specifically approved of the exact situation in this case as not constituting hearsay, as the court cited approvingly to *Hybert v. Hearst Corp.*, 900 F.2d 1050, 1053 (7th Cir. 1990), noting that "statements by the plaintiff's supervisor about 'the attitude, intentions and/or policy of the higher-ups' in management were properly admitted into evidence." *Id.* at 1456 (citing *Hybert*). The situation in the *Hybert* case that *Zaben* approved, is precisely the situation here, given the relationships between Karge, Bussell's supervisor, and Pennington as Bussell's Motorola supervisor.

Bussell testified that Karge made it clear that Pennington had the power to prevent Bussell from becoming a permanent employee, as follows:

> A: [After the pulling-down-the-pants incident, which Bussell complained about as being sex harassment]. Yes. I told Tom what had happened. Tom came back to me. All of a sudden, Tom's telling me that both Russ and I are no longer eligible to be made

> Motorolins because Laila has made it impossible for us.

(R2-109-168). After six to eight months at work, the temporary employees were being made permanent employees. (R2-109-169). Bussell testified as follows:

> Q: Did anyone tell you when you went to Motorola that this was a six-month assignment?
>
> A: Nope. They told us it was temporary, but they said it could be six months to a year to longer, but that we had the opportunity after six months to be transferred to be a Motorolin.

(R2-109-183). Bussell was told that she was not going to move up to such a position. (R2-109-265). Again, Defendants' argument that it is undisputed that Bussell could never have been made a permanent Motorola employee is a disputed issue of material fact.

The fact is that the circuits are not in agreement on what evidence is direct or not, and if so, what the affects are of such evidence. The Fifth Circuit has recently wondered whether *Desert Palace* alters the *Price Waterhouse/ McDonnell Douglas* dichotomy – namely, whether the existence of direct evidence takes the case out of the *McDonnell Douglas* framework, and into the *Price Waterhouse* framework, putting the burden on the defendant-employer to prove that it would have made the challenged decision in the absence of discrimination. *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 310 & n.7 (5th Cir. 2004). The *Rachid* court, and several courts of appeals, held that direct evidence requires the denial of summary judgment for the defendant-employer. *Id.* (applying both the *McDonnell Douglas* and *Price Waterhouse* frameworks); *Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 463 (6th Cir. 2003) (holding that a plaintiff will survive summary judgment by proffering direct evidence of discrimination, applying the *Price Waterhouse* framework); *EEOC v. Liberal R-II Sch. Dist.*, 314 F.3d 920 (8th Cir. 2002) (holding same, and finding that direct evidence consisted of the employee

being told he was too old to perform the job, and employer referred to his age as being a reason for termination at an unemployment proceeding).

Although the Eleventh Circuit has long acknowledged that the utterance of statements demonstrating discriminatory animus by the decision-maker constitute direct evidence of discrimination, *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1189-90 (11th Cir. 1997) (collecting cases), the Eleventh Circuit has recently held that evidence of statements demonstrating discriminatory animus (direct evidence) do not warrant the denial of summary judgment. *Crawford v. City of Fairburn*, 482 F.3d 1305, 1309 (11th Cir. 2007) (analyzing a discrimination case via the *McDonnell Douglas* framework, and affirming summary judgment to the employer, even though evidence existed that the decision-maker exhibited discriminatory animus toward the plaintiff's protected classification, which previous panel opinions held constitute direct evidence under the *Price Waterhouse* framework). The confusion in the circuits concerning what constitutes direct evidence, and when such evidence exists, how it affects the case, needs to be resolved to provide needed clarity in this area of the law.

The Defendants claim that the panel opinion was correct in holding that Bussell did not suffer actionable adverse employment action. Bussell suffered adverse employment action, and Motorola admitted that Bussell had her pay docked. (*Motorola's Brief to Eleventh Circuit* at 48) (citing R2-78-159-161). Further, as argued below (*Statement of Facts in Opposition to Summary Judgment* at p. 17, ¶ 138) and (*Brief on Merits* 33-34), Bussell was given 3-5 times the work of others after she complained, was sent home (suspended) without pay (which caused her to suffer economic loss), and she was not made a permanent Motorola employee, which caused her to suffer economic loss. Even under prior precedent, such economic loss is clearly actionable for a retaliation claim. *Gillis v. Georgia Dep't of Corr.*, 400 F.3d 883 (11th Cir. 2005). Being subjected to such adverse action would clearly dissuade a reasonable person from complaining of sexual harassment.

Bussell clearly argued below that she had direct evidence of sexual harassment, retaliation, and constructive discharge. *See Bussell's Statement of Disputed Facts in Opposition to Defendants' Motions for Summary Judgment* (pp. 13, 15, 16, 127, 18; ¶¶ 88, 114-16, 120, 125-27, 135), and *Memorandum of Law in Opposition to Summary Judgment* (pp. 2, 8, 13-16, 17, and 20), and (*Eleventh Circuit Brief* at pp. 26, 30, 31-32, 33, and 35). *See also* (*Petition for En Banc Review* at 15).

The Defendants argue that the harassment stopped by December 2000, but there is disputed evidence concerning that issue, because Karge admitted that Bussell was still complaining about sexual harassment after the December 26, 2000, meeting she had with Covington, as follows:

> Q: So, was Megan [sic] complaining about harassment after she met with Marcy [Covington] that day?
>
> A: When we met with Marcy was after the meeting and – in about a – two or three days later Meghan came back saying that it's still continuing.

(R2-112-133-34).

II. THERE IS A SPLIT IN THE CIRCUITS CONCERNING THE APPLICATION AND INTERPRETATION OF *WHITE*.

The Defendants argue that *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006) is too new an opinion for the Court to interpret it at this point, but research shows that each court of appeals has approximately 50 decisions interpreting *White's* scope.

Despite the evidence of adverse employment action demonstrated by Bussell, the Eleventh Circuit simply concluded that none of it individually was materially adverse to Bussell. (*See Appx.* at 2a, cert. pet.). That is not the *White* standard, as the *White* standard is that if the adverse employment action "might have dissuaded a reasonable

worker from [complaining of sexual harassment]" the adverse action is actionable. *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415 (2006). Some courts of appeal are following the Eleventh Circuit's rendition of the test (is the adverse action materially adverse), *Dilettoso v. Potter*, 2007 WL 2051415, *2 n.3 (9th Cir., July 17, 2007); *Moore v. City of Philadelphia*, 461 F.3d 331, 346 (3d Cir. 2006), and others are following the rendition suggested here, and set forth clearly in *White* (that if the action could have dissuaded a reasonable worker from complaining it is actionable). *Kessler v. Westchester County Dep't of Soc. Servs.*, 461 F.3d 199, 207 (2d Cir. 2007); *Clegg v. Arkansas Dep't of Correction*, ___ F.3d ___, 2007 WL 2296414, *5 (8th Cir. 2007). This split in the circuits should be resolved, and in this case, the adverse actions Bussell was subjected would have dissuaded a reasonable worker; thus, the Eleventh Circuit's failure to apply *White* properly prejudiced her.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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